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No._____

IN THE

Supreme Court of the United States

October Term, 1980

FAIRDALE FARMS, INC.,
Petitioner,

vs.

YANKEE MILK, INC.,
and
REGIONAL COOPERATIVE MARKETING AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Do the Capper-Volstead and Clayton Acts immunize agricultural cooperatives from Section 2 of the Sherman Act so that they may, unlike other business corporations, engage in willful acquisition and maintenance of monopoly power, so long as they do not engage in "predatory" conduct?

2. Is a "marketing agency in common", formed by eight separate cooperatives to do nothing more than fix prices, exempted by the Capper-Volstead and Clayton Acts from the prohibitions of Section 1 of the Sherman Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 9, 1980.

Parties

The parties are Plaintiff Fairdale Farms, Inc. (sometimes hereinafter referred to as "Fairdale") and Defendants Yankee Milk, Inc. (sometimes referred to hereinafter as "Yankee") and the Regional Cooperative Marketing Agency (sometimes referred to hereinafter as "RCMA"). *Amicus Curiae* briefs were filed at the appellate level by the United States Department of Justice and the National Council of Farmer Cooperatives.

Reported Opinions

The District Court's Order and Opinion has not been officially reported. It is printed in relevant part at 1980-1 CCH Trade Cases, pp. 63,029 (D.C.Vt. 1979). The Opinion of the Court of Appeals is reported at ____ F.2d ____ (2nd Cir. 1980). Both opinions are fully set forth in the Appendix submitted with this petition.

Grounds for Jurisdiction

The Order sought to be reviewed is a decision of the United States Court of Appeals for the Second Circuit, issued on December 9, 1980, in an interlocutory appeal and cross-appeal by permission of the Court under 28 U.S.C. §1292(b).

This Court has jurisdiction to review the decision by a Writ of Certiorari under 28 U.S.C. §1254(1).

Statutes

Sherman Act (15 U.S.C. §1, §2)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Clayton Act, §7 (15 U.S.C. §18)

§18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of

such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act, §6 (15 U.S.C. §17)

Antitrust laws not applicable to labor organizations.—The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint or trade, under the antitrust laws.

The Capper-Volstead Act of 1921, §1 (7 U.S.C. §291)

§291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

The Cooperative Marketing Act of 1926 (7 U.S.C. §455)

Exchange of crop information by associations of agricultural producers.—Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

Statement of the Case

This Writ is sought in an antitrust action to review the December 9, 1980, decision of the United States Court of Appeals for the Second Circuit in an interlocutory appeal by permission under 28 U.S.C. §1292(b). The decision affirmed in part and vacated and remanded in part an Order of the United States District Court for the District of Vermont, the Honorable Albert W. Coffrin, presiding.

Reversing the District Court, the Court of Appeals refused to apply the monopolization standard of *United States v. Grinnell Corporation*, 348 U.S. 563, 570-1 (1966), applicable to ordinary business corporations, to agricultural cooperatives, holding that "predatory" practices must be shown. The Court of Appeals remanded the case to the District Court for a determination as to whether the Plaintiff has shown sufficient predatory acts to escape Defendants' summary judgment motions.

Affirming the District Court's grant of summary judgment for the Defendants, the Court of Appeals held that RCMA, a group of eight separate dairy farmer cooperatives, and its members were immune under the Capper-Volstead Act from liability for price-fixing under the Sherman Act, even though they engaged in *no inter-cooperative activity other than setting the price at which members would sell their product.*

Facts Of The Case

The undisputed facts presented by the parties in support of their summary judgment motions may be summarized as follows. Plaintiff Fairdale Farms, Inc., is an employee-owned corporation located in Bennington, Vermont, which processes raw milk and sells its fluid milk

and milk products to supermarkets and other outlets in Vermont, Massachusetts and eastern New York. Fairdale produces milk in its own dairy herd, and purchases milk from farmers in the surrounding three county area composed of Bennington County, Vermont; Berkshire County, Massachusetts; and Rennselaer County, New York.

Defendant Yankee Milk, Inc., is an agricultural cooperative, composed of dairy farmer members, which purchases milk from its members under contract and sells this milk to processors, such as Fairdale. Yankee has had up to approximately 6,000 producer members and between 350 to 450 employees. It operates in 7 states, and in 1974 and 1975 its members produced approximately 3 billion pounds of milk per year.[1] During the fiscal year ending June 20, 1974, this resulted in sales of over a quarter billion dollars.

Yankee was formed in June of 1972 by the union of the three largest New England dairy farmer cooperatives. Immediately after the merger, Yankee controlled the following market shares:

Massachusetts	- 71% of milk produced
Vermont	- 39%
Maine	- 70%
New Hampshire	- 79%
Rhode Island	- 87%
Connecticut	- 77%
New York	- 5%

Shortly thereafter, another large cooperative (Dairylea, Inc.) pledged to Yankee control of 1,600 of its New England dairy farmers.

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[1] A comparison of the relative size of the parties can be made by comparing this figure with the 22 million pounds processed by Fairdale in 1977.

Defendant Regional Cooperative Marketing Agency ("RCMA") is an organization of dairy farmer cooperatives (including Yankee), two federations of dairy farmer cooperatives (one having 50 cooperatives as members) and a common marketing agency representing two of RCMA's member cooperatives. RCMA has had up to eight members who represent some 26,000 dairy farmers in a nine state region. These farmers produce a major portion of the total milk supplies for three federal regulatory markets and two state regulatory markets. All RCMA member cooperatives are also engaged in processing dairy products and/or fluid milk. These coops have now or in the past have had the capacity to process a substantial portion of the milk their members produce.

RCMA's sole function, and the purpose for which it was formed, is to fix the price at which its members sell their milk in certain New England and New York regulatory markets. It *does not* itself engage in any of the collective functions its member cooperatives perform on behalf of their members, such as marketing, billing, handling and processing. Rather, RCMA members meet monthly to decide on a price they will charge milk processors, such as Fairdale, on fluid milk. When the members feel a price higher than the regulatory price is justified, the members bill and collect a "premium" (that portion of the price which exceeds the applicable regulatory price). The premium is in addition to the usual cooperative service charges. The member cooperatives remit the premium to their producers in a check separate from their ordinary "milk check". Over the three years in which the premium was charged, RCMA members collected over twenty million dollars in premiums.

Yankee and RCMA had acquired enough market power not only to raise RCMA members' prices, but also to affect prices so substantially within Vermont and Main that the state regulatory agencies raised their prices to prevent disorder within the market. Also, other smaller cooperatives which were not RCMA members were able to ride along on its coattails and collect over-order prices for their producers.

At the time this dispute arose, Yankee controlled at least 57 to 67 percent and RCMA controlled at least 86 percent of the volume of milk in the three county area from which Fairdale procured its milk.[2] Some 40 percent of Fairdale's milk supply came from producers who where members of an RCMA member cooperative.[3]

The dispute between the parties arose in the fall of 1974, when Fairdale refused to pay the RCMA premium to Yankee. Yankee responded that it was "pulling" (stopping shipment of) all its producers' milk that went to Fairdale, even though the premium was imposed on only some of these producers' milk. Although, upon Fairdale's request, Yankee agreed to discuss the matter, it at one point instructed its producers to immediately withhold their milk from Fairdale. With this threat of cut-off of its necessary daily milk supply hanging over Fairdale, negotiations to find an acceptable basis for continued shipment failed, and relations were terminated as of January 1, 1975.

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[2] Yankee's former general manager testified that a 65 percent share of the market is required to impose the premium.

[3] Fairdale had relationships with most of the Yankee producers that predated their cooperative affiliation. Thus, Fairdale dealt directly with the producers, picking up their milk and paying them directly, etc.

As a result of these actions, Fairdale incurred damages such as the extra cost of purchasing milk at spot milk prices from distant sources to cover its needs until it was able to develop other producer sources, and its ongoing costs in purchasing milk from new producers located outside its usual procurement area. In addition, Fairdale lost a major supermarket account because, with the abnormally high price it was paying, it was unable to maintain its price at competitive levels. Fairdale also seeks damages for the excess amount it has paid under the Vermont state order whose price was raised as a direct impact of inflated RCMA prices.

Prior Proceedings

The Amended Complaint in this action was filed on June 4, 1976, and alleged that Defendants violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §1 and §2) and Section 7 of the Clayton Act (15 U.S.C. §18), by price-fixing, attempting to monopolize, monopolization, and anticompetitive mergers.[4] Defendants rely on Section 6 of the Clayton Act, the Capper-Volstead Act, and Section 5 of the Cooperative Marketing Act as defenses to their acts.

The case came before the District Court on motions for summary judgment. Plaintiff and both Defendants moved for summary judgment on Count I (the price-fixing count) and Defendants moved for summary judgment on Count II (the monopolization count). The District Court granted the Defendants' motion for summary judgment on the price-fixing count and denied Defendants' motion for summary judgment on the monopolization charge.

[4] The original complaint was directed against Yankee Milk, Inc., only. Upon motion of Yankee, RCMA was added as a necessary party under F.R.C.P. 19, and an Amended Complaint was filed.

Pursuant to certification by the District Court and permission by the Second Circuit Court of Appeals, cross-appeals on these questions were taken pursuant to 28 U.S.C. §1292(b).

In their motion on the monopolization count, Defendants argued that without a showing of "predatory practices" (they claimed there were none), they were immune from Sherman Act Section 2 liability for willful acquisition and exercise of monopoly power by virtue of the Capper-Volstead Act. However, the District Court denied the motion for summary judgment on the monopoly charge, holding that a cooperative or group of cooperatives were entitled to no greater protection than an ordinary business corporation and, under the definition of monopolization set forth in *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), could be liable for a violation of Section 2 without a specific showing of predatory conduct. Under *Grinnell*, two elements were required for proof of monopolization:

> (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acument, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

The District Court held that the precise test of *Grinnell* applied in this case, and refused to agree "with Defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative", stating that "a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation".

The Court of Appeals for the Second Circuit reversed and vacated the District Court's opinion on this Count. The Court of Appeals stated:

> By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies.

The Court then went on to hold:

> We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves.

In this way the Court resolved what it perceived to be the conflict between the Capper-Volstead exemption and the Sherman Act principles.

Under the cross-motions for summary judgment on the price-fixing count, Fairdale argued that RCMA, whose sole function was to fix the price at which its members would sell their milk, was not engaged in "marketing" or any other collective activity specified in the Capper-Volstead Act, and thus this inter-cooperative combination solely for the purpose of price-fixing was a *per se* violation of Sherman Act Section 1. However, the District Court adopted the reasoning of Judge Orrick in *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative,*[5] and of the Federal

[5] 413 F.Supp. 984, 987 (N.D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (9th Cir. 1978), *cert. den.* 439 U.S. 1090 (1979).

Trade Commission in *Central California Lettuce Producers Cooperative.*[6] The District Court followed Judge Orrick's dicta:

> Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.

The Court of Appeals affirmed this portion of the District Court's opinion using the same reasoning.

ARGUMENT

We respectfully submit that this Court should grant a Writ of Certiorari to determine whether the Court of Appeals correctly extended the Capper-Volstead and Clayton Act exemptions to immunize conduct by agricultural cooperatives which would have subjected ordinary business corporations to liability under the antitrust laws. This is an important question of federal law, which is especially pressing given the recent growth of some agricultural cooperatives, particularly associations of milk producers, to positions of economic dominance in their product markets. In addition, we submit that the Court of Appeals has abandoned a fundamental rule of construction laid down by this Court, requiring that antitrust immunity conferred by act of Congress be narrowly construed in any resolution of conflict with the Sherman Act.

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[6] (1977) Trade Reg. Rep. (CCH) para. 21,337 at 21,234 (F.T.C.).

I. These Questions Are Important Issues of Federal Law Which Have Not Been, But Should Be, Decided by This Court.

The importance of the delimitation of the Capper-Volstead exemption to the agricultural sector of our economy and in the national enforcement of antitrust laws is obvious. A brief review of the few Capper-Volstead cases bearing on these issues and the parameters of the arguments presented in this case demonstrate that these issues of first impression are ripe for review by this Court.

A. The Monopolization Charge

Count II of the Amended Complaint alleges that Yankee and RCMA have violated Section 2 of the Sherman Act, 15 U.S.C. §2, by monopolizing or attempting to monopolize the raw milk market from which Fairdale obtains its supply. RMCA and Yankee argued below that the pleadings and record failed to show that they had engaged in any predatory practices and that absent such claims the Capper-Volstead Act gives them, as agricultural organizations which qualify under that Act, an exemption from the prohibitions of Section 2 of the Sherman Act. Defendants have taken the position that willful acquisition and exercise of monopoly power are permissible as long as the cooperative does not combine with non-exempt entities in unreasonable restraint of trade or engage in competition-stifling, predatory practices. The Court of Appeals adopted this argument.

The District Court had rejected Defendants' arguments, and ruled that the Capper-Volstead Act does not add a requirement to Section 2 of the Sherman Act compelling a plaintiff to allege and prove predatory acts

in order to prevail against an agricultural cooperative or association of cooperatives. On that basis, the District Court denied Defendants' motion for summary judgment.

Fairdale maintains, as the District Court did, that *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), prohibits the willful acquisition and exercise of monopoly power for agricultural cooperatives, as it does for ordinary business corporations.[7] The Court of Appeals, finding that the willful acquisition and maintenance of monopoly power is inherent in the formation, growth, and operation of a powerful cooperative, held *Grinnell* did not apply.

Neither the text of the Sherman Act, Section 2, nor the Capper-Volstead Act suggest that predatory practices are an essential element of a Section 2 case. The Sherman Act itself makes it illegal for persons to monopolize, attempt to monopolize, or combine with others to monopolize trade or commerce. The Capper-Volstead Act, on the other hand, permits farmers, including dairy farmers, to join together in cooperative associations for the purpose of processing, handling, or marketing their product. Nothing in the language of the Capper-Volstead Act suggest a repealer of Section 2 of the Sherman Act

[7] *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911), also made it clear that it is the conscious purpose to gain monopoly power that is the essence of the offense, and this does not depend on proof of predatory practices. The Standard Oil Company was notorious for its predatory practices but most of these occurred before the Sherman Act was enacted in 1890 and the Court noted that liability could not be based on such acts. The primary fact that was held to be a violation of both Sections 1 and 2 was the combining of most of the refining industry under a single holding company—not unlike the assembly through RCMA of most of the cooperatives in the market area.

or an addition of elements such as predatory practices to the Sherman Act.

Very few federal cases even approach the issue. The Court of Appeals referred to a series of cases in which courts have found agricultural cooperatives guilty of violating Section 2 of the Sherman Act. Since all of these cases involve farmer organizations that had engaged in blatantly predatory practices, the Defendants have argued that Plaintiffs who sue qualified entities must show at least one act of this character in addition to proving the elements of monopolization as set out in the *Grinnell* case. None of these cases contain a holding to that effect.

No previous cases have reached the issue of whether the *Grinnell* standard is applicable to agricultural cooperatives. Commentators have lamented the lack of definitive rulings on the question of the permissible extent of cooperative market power. Areeda and Turner note "the critical questions, on which there is surprisingly little authority, of whether the antitrust laws limit a cooperative's market power."[8]

Thus, the Court of Appeals decision is a highly significant authorization of monopolistic behavior by the Defendants and other agricultural cooperatives. Not only will this ruling adversely affect processors, consumers, and unaffiliated farmers, but may also have the unfortunate effect of leading cooperatives "down the garden path" to conduct which may later be determined to be illegal. The case has been fully briefed and argued below and is ripe for decision of this Court.

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[8] 1 Areeda and Turner, *Antitrust Law*, 180.

B. The Price-Fixing Count

This case is the first in any jurisdiction to present the clear issue of whether a group of cooperatives may establish a meeting ground solely to raise prices if they perform no other services and thus offer no efficiencies benefitting the individual cooperatives, their purchasers, or the consumer. The issue raises serious policy concerns, which require harmonizing the Capper-Volstead Act with the antitrust laws.

One aspect of the price-fixing issue in this case is whether Capper-Volstead entities are immunized from liability under Sherman §1 for inter-cooperative activity. This Court has held that Capper-Volstead cooperatives may be liable under Section 1 of the Sherman Act for combinations with non-Capper-Volstead entities.[9] And, it has held that qualified Capper-Volstead cooperatives, made up of the same three members and for all practical purposes one organization, were one entity and thus could not be conspirators under Section 1.[10] These cases, however, provide the two extremes—combination with a non-Capper-Volstead entity, which is not exempt, and "conspiracy" by a Capper-Volstead entity with itself, which is exempt.

This case presents a different situation—a combination of several Capper-Volstead entities which are all (with the exception of the marketing agency and the two

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[9] *U.S. v. Borden*, 308 U.S. 190, 84 L.Ed. 186, 60 S.Ct. 182 (1939); *National Broiler Marketing Association v. United States*, 436 U.S. 816, 56 L.Ed.2d 728, 88 S.Ct. 528, *reh. den.* 390 U.S. 930, 19 L.Ed.2d 995, 88 S.Ct. 846 (1978).

[10] *Sunkist Growers Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 8, at 29, 8 L.Ed.2d 305, 82 S.Ct. 1130, *reh. den.* 370 U.S. 965 (1962).

cooperatives it markets for) entirely separate entities having separate members, who come together solely for the purpose of price-fixing.

The other aspect of the issue under Section 1 of the Sherman Act is whether RCMA is a bona fide "marketing agency in common", when its sole activity is price-fixing. Fairdale maintains that, because Capper-Volstead only authorizes certain collective activity, (*i.e.* processing, preparing for market, handling, and marketing), price-fixing is permissible only to the extent that it is incidental to a collective marketing program, or other collective activity specified in the Act.[11] There is nothing in the Capper-Volstead Act that specifically provides for naked price-fixing as the sole activity of a group of cooperatives.

Defendants have relied on two Ninth Circuit Court of Appeals cases in which the Court approved certain price fixing behavior by Capper-Volstead entities. The first case, *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. den.* 419 U.S. 999 (1974), approved activities of two bargaining cooperatives, each composed of individual potato farmers, which bargained with buyers for the best price on behalf of their members. The two coops agreed on the prices and terms of contracts before setting out to

[11] The Court of Appeals stated in its opinion that Fairdale argued that Capper-Volstead gives only single cooperatives, rather than associations of cooperatives, the right to price fix. This is a misunderstanding of Fairdale's unitary position, which is that whatever RCMA is called under the Capper-Volstead Act, it only has a "right" to price fix if such activity is inherent in other collective activity it performs. Because RCMA engages in no other collective activity it cannot fix prices. As a practical matter, however, the Court does not have to address the question of whether an association or producers may price-fix, since RCMA claims to be a "common marketing agency" and is comprised of associations, not producers.

bargain with the potato buyers. As a practical matter, once one coop had settled on terms with the buyer, the other coop received the same terms. The Court reasoned that if the coops could have marketing agents in common, they could act together in marketing their products, on the theory that what an agent could legally do, so too could the principal. 497 F.2d at 214.

In *Northern California Supermarkets Inc. v. Central California Lettuce Producers Cooperative, et al.*, 413 F.Supp. 984 (N.D. Cal. 1976), *aff'd per curiam* 580 F.2d 369 (9th Cir. 1978), *cert. den.* 439 U.S. 1090 (1979), the District Court, which was affirmed without further opinion by the Court of Appeals, found *Treasure Valley, supra*, to be controlling. The District Court, Judge Orrick presiding, approved a cooperative of lettuce growers whose most significant function was to decide price brackets for its members to charge. The Court held that the coop's activities fell within the term "marketing" as broadly construed in *Treasure Valley*. 413 F.Supp. at 992. From this case comes the dicta relied on here that since the coop could have engaged in the much more anticompetitive conduct of collectively marketing and bargaining, it would be anomalous to hold it responsible for merely price fixing. 413 F.Supp. at 992.

Both these cases involve fact situations which fall short of the instant case. In *Treasure Valley*, the bargaining coops, in their negotiations with the buyers, were, as a practical matter and with each other's consent, actually also bargaining for the other; thus the price-fixing was incidental to the joint bargaining activity. In *Central Lettuce*, the coop was an organization of individual producers, not cooperatives, and actually engaged in promotional and other activities on behalf of

its members. The instant case, in contrast, involves an organization of *cooperatives* which has *no joint activity* except price-fixing.

Fairdale maintains that to hold that bald price-fixing is "marketing" does violence to the intent and wording of the Capper-Volstead Act, and cannot find legalization in any way other than by falling within the express terms of the statute. There are good reasons for allowing collective activities, such as marketing and processing, since they may result in cost savings through economies of scale. Price-fixing is anticompetitive activity which has no such benefits. Further, Fairdale contends that the Court's rationale, that because farmers and their coops *could* combine into entities that could be even more anticompetitive they should be allowed to engage in price-fixing, is a novel theory that is not applied to other business entities, and therefore not authorized by Capper-Volstead.

Again, there is a lack of authority on this very crucial issue. One commentator, complaining that the law concerning the exception is "extraordinarily undeveloped", pointed particularly to the lack of authority on the question of mergers of cooperatives and agreements between cooperatives.[12] Another notes the lack of "court comment" on the power of producers and associations of producers to merge and to have marketing agencies in common.[13] The Department of Justice's 1977 Study on Milk Marketing also noted that the law on marketing agencies in common needed to be clarified.[14]

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[12] Mahaffie, Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View, 22 Ad.L.Rev. 435, 441-442 (1969-1970).

[13] Hafstedler, A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed, 22 Ad.L.Rev. 455 at 463-465.

[14] Milk Marketing, A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities 583-85 (Jan. 1977).

Again, in the vacuum of case law on these topics, the Second Circuit's decision in this case has enormous impact. The decision, approving both price-fixing and market control, puts an extremely powerful tool into the hands of cooperatives with which to attain market control and demand higher prices.

II. The Court of Appeals Decision Conflicts With Prior Analysis of the Exemption by This Court.

The decision of the Court of Appeals in many ways ignores this Court's decisions interpreting the Capper-Volstead exemption.

In its first Capper-Volstead case, *U.S. v. Borden*, 308 U.S. 188 (1939), this Court stated:

> It is a cardinal principle of statutory construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. 308 U.S. at 198.

Borden, of course, involved price-fixing agreements by an agricultural cooperative with other entities not covered by the Capper-Volstead or Clayton Acts. These agreements were challenged under Sherman Act §1. The Court found:

> The right of these agricultural producers thus to unite in preparing for market and in marketing their products and to make the contracts which are necessary for the collaboration, cannot be deemed to authorize any combination or conspiracy, or conspiracies, with other persons in restraint of trade that these producers may see fit to devise. 308 U.S. at 204.

In the instant case, however, rather than reconciling the exemption with the Sherman Act, the Court of Appeals

found that "there is an inherent conflict between this provision (Sherman Act §2) and those of the Capper-Volstead . . . ." The Court then went on to resolve this conflict in favor of broadly construing the exemption, on the theory that agricultural cooperatives were "a favorite child of Congressional policy".

The Court of Appeals thus disregarded numerous pronouncements by this Court on the congressional policy favoring competition as the basis of the nation's economic framework and barring repeals of the antitrust laws "by implication".

In *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960), this Court held that the allegations against a cooperative under Section 2 of the Sherman Act, alleging anticompetitive activities "so far outside the legitimate objects of a cooperative" that if proven would constitute clear violations of Section 2 were not immunized by the Capper-Volstead or Clayton Acts. 362 U.S. at 468. In its unanimous opinion, the Court stated:

> We believe it was reasonably clear from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. 362 U.S. at 466.

Abandoning this clear interpretation of the extent of the exemption, the Court of Appeals chastised the District Court for "disregarding the fundamental differences between a cooperative and a corporation" by subscribing to the corporate monopolization test of *Grinnell*.

And, in *Case Swayne Co. v. Sunkist Growers,* 389 U.S. 384, 19 L.Ed.2d 621, 88 S.Ct. 528 (1967), this Court again noted that Capper-Volstead was a "special exemption to a general legislative plan" and therefore the Court would not be justified in expanding its coverage. 389 U.S. at 393. The Court held that Sunkist lost its Capper-Volstead exemption when its members included those not engaged in the actual growing of agricultural products. A similar conclusion was reached by the Court in *National Broiler Marketing Ass'n v. U.S.,* 436 U.S. 816, 56 L.Ed.2d 728, 88 S.Ct. 528, *reh. den.* 390 U.S. 930, 19 L.Ed.2d 995, 88 S.Ct. 846 (1978). This Court referred with approval to Justice Black's summarization of the legislative history in *Maryland and Virginia, supra.* The Court held that members of the Broiler Marketing Association who did not own a breeder flock or a grow-out facility for chickens were not "farmers" under the Act, and thus were not entitled to the "limited protection of the Capper-Volstead Act". 436 U.S. at 828-829.

These cases, following closely the language of the Capper-Volstead Act and limiting the scope of the exemption, indicate that the Court of Appeals should have been more circumspect in its delineation of the extent of the Capper-Volstead exemption.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Notice of Appearance

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

FAIRDALE FARMS, INC.,

Petitioner,

vs.

YANKEE MILK, INC.,
and
REGIONAL COOPERATIVE MARKETING AGENCY,

Respondents.

NOW COME, Fred I. Parker, Esq. and Susan F. Eaton, Esq. of the law firm of Langrock Sperry Parker and Stahl, and Keith I. Clearwaters, Esq. of the law firm of Chapman & Clearwaters, and appear for the Petitioner, Fairdale Farms, Inc., in the above captioned matter.

DATED this ____ day of March, 1981.

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Certificate of Service

WE, Fred I. Parker, Esq. and Susan F. Eaton, Esq., members of the firm of Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, and Keith I. Clearwaters, Esq., of the firm of Chapman & Clearwaters, 1700 K Street, N.W., Washington, D.C. 20006, attorneys for the Petitioner in the above entitled cause, and members of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of March, 1981, we served copies of the foregoing Petition for a Writ of Certiorari and all appendices attached thereto and our Notice of Appearance on Yankee Milk, Inc. and Regional Cooperative Marketing Agency, by mailing three copies thereof, in duly addressed envelopes with first class postage pre-paid, to the attorneys of record for said Respondents, Thomas D. Clifford, Esq., Shipman & Goodwin, 799 Main Street, Hartford, Connecticut 06103 and David P. O'Hara, Esq., Bond, Schoeneck & King, One Lincoln Center, Syracuse, New York 13202.

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APPENDIX

Opinion and Order of the United States District Court for the District of Vermont.

UNITED STATES DISTRICT COURT

For the District of Vermont

FAIRDALE FARMS, INC.,

v.

YANKEE MILK, INC., and
REGIONAL COOPERATIVE MARKETING
AGENCY, INC.

YANKEE MILK, INC.,

v.

FAIRDALE FARMS, INC.

Civil Action File No. 75-140

The Capper-Volstead Act, 7 U.S.C. §291, allows farmers to organize cooperatives to strengthen their bargaining power in the markets where they sell their produce. This case raises questions about the scope of the protection this statute affords dairy cooperatives from suit under the federal antitrust laws. Plaintiff Fairdale Farms, Inc. (Fairdale) charges in its two count Amended Complaint that the defendant cooperatives, Yankee Milk, Inc. (Yankee) and Regional Cooperative Marketing Agency, Inc. (RCMA), have fixed prices and

monopolized the market in which Fairdale buys its raw milk. Defendants have moved for summary judgment on both counts; plaintiff seeks summary judgment on Count I, its price-fixing claim. We grant defendants' motions on Count I and deny plaintiff's; we decline to give judgment on the monopoly claim and therefore deny (illegible).

Facts

Fairdale is what is known in the dairy industry as a "handler" which produces some of its own milk but primarily buys milk from local farmers, processes it and distributes it to retailers. Yankee is a cooperative incorporated in Connecticut and composed of several thousand dairy farmers, or producers, from all over New England. Before this suit, many of Yankee's members sold their milk to Fairdale. The Secretary of Agriculture has determined and the parties do not dispute that Yankee qualifies for the protection afforded by the Capper-Volstead Act. RCMA is an entity created in June, 1973, by seven northeastern dairy cooperatives, including Yankee, to fix the prices at which the cooperatives would sell their milk and to distribute among the cooperatives the additional income resulting from that price fixing. Membership in RCMA is limited to cooperatives that meet the requirements of the Capper-Volstead Act.

In the northeast, both the Secretary of Agriculture and state agencies regulate the price of raw milk by imposing floors under the price handlers must pay producers. Nevertheless, in 1973 and 1974 producers faced rapidly increasing production costs that were not being met by rises in the regulatory floors. To protect their members

from this cost-price squeeze, seven cooperatives formed RCMA which in September, 1973, set a price for its members' milk above the federal floor (the production incentive differential). Fairdale balked at paying this price and eventually stopped purchasing milk from Yankee members, because it feared that Yankee would interrupt its supply from the member-producers without adequate notice. This suit followed the breakdown in the Fairdale-Yankee relationship.

Discussion

1. Count I: Price Fixing.

Count I of the Amended Complaint alleges that defendants have violated section 1 of the Sherman Act, 15 U.S.C. §1, by fixing the price of raw milk. Since price fixing is a *per se* violation of section 1 of the Sherman Act, *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), and defendants have conceded that RCMA was organized to facilitate agreement on price among the member cooperatives and has fixed prices; plaintiff asserts that it is entitled to judgment on Count I. Defendants argue that both Yankee and RCMA qualify for the protection of the Capper-Volstead Act[1] which they claim permits agricultural cooperatives to fix prices notwithstanding the federal antitrust laws; they also seek judgment as a matter of law.[2] Plaintiff does not contest that Yankee may fix the price its own members charge, but Fairdale does object to the claim that the Capper-Volstead Act also protects RCMA's activity. Thus the resolution of the cross-motions for summary judgment on Count I turns on the application of the Capper-Volstead Act to RCMA and the functions it performs.

The court is satisfied that Congress intended this Act to protect organizations like RCMA, which are composed of qualified cooperatives, to the same extent as the cooperatives themselves; RCMA is either an "association" or a "marketing agen[t] in common." 7 U.S.C. §291. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (refusal "to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect"); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-17 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974) (cooperation between two cooperatives in negotiating contracts with buyers protected); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 355 F. Supp. 408, 415 (C.D. Cal. 1971) (cooperative of growers and smaller cooperatives protected); *United Egg Producers v. Bauer International Corp.*, 312 F. Supp. 319, 320 (S.D.N.Y. 1970) (Capper-Volstead Act bars claim that qualified cooperatives conspired in violation of Sherman Act section 1). This conclusion does not, however, dispose of plaintiff's principal argument—that the Capper-Volstead Act does not immunize from antitrust attack an organization that does nothing but fix prices.

We recognize RCMA's assertion that it performs more functions for its members than simply providing a vehicle for fixing prices, however, we decline to give any weight to this claim. Although it is apparent from the record that RCMA pools the funds its members receive from the production incentive differential and distributes them fairly among the member cooperatives, we cannot regard this as a separate service. Rather, it is little more than a component of RCMA's price fixing. Similarly, the

other activities RCMA points to, *see* Response of RCMA to Plaintiff's Interrogatories (As Amended)—Third Set at 25-43 (filed Oct. 25, 1977), are necessary, or at least ancillary, to RCMA's satisfactory performance of its price-fixing function. Moreover, whether RCMA does anything other than fix prices is immaterial in light of our rejection of plaintiff's principal argument.

We now turn to the principal issue the Count I motions raise—whether the Capper-Volstead Act immunizes from attack under section 1 of the Sherman Act an agricultural organization that does nothing but coordinate the price-fixing activities of its member cooperatives. We hold that it does.

Since the legislative history of the Capper-Volstead Act is somewhat ambiguous and lacking in examples, it gives little assistance to deciding what specific functions a qualified entity can safely perform. *See* FTC Bureau of Competition, A Report on Agricultural Cooperatives at 28-40 (1975) [hereinafter cited as FTC Staff Study]. It is clear, however, that Congress intended the bill to put farmers organizations on an equal footing with business corporations in antitrust cases. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466 (1960). Thus a cooperative may fix the prices its members charge just as a corporation fixes the prices of its goods; it need not fear that a court will view each farmer as an individual who, by joining the cooperative and agreeing to the price, conspired to restrain trade in violation of section 1 of the Sherman Act. *Id.* Congress hoped that allowing farmers to act collectively as cooperatives would enhance their bargaining power against large corporate middlemen and perhaps enable

the farmers to integrate vertically and take over the middlemen's functions. *See, e.g., National Broiler Marketing Association v. United States,* 436 U.S. 816, 824-28 (1978); *Central California Lettuce Producers Cooperative,* [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,235 (F.T.C.). But, since no ordinary business corporation exists simply to fix prices, this evidence of congressional intent provides no answer to whether the Act protects a cooperative that just fixes prices. "In summary, although price-setting was clearly a contemplated activity, the legislative history does not address the question whether or what kind of additional activity is required to qualify for the exemption." [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,236.

We have found only two decisions which address this question. Both the Federal Trade Commission (FTC) and the Northern District of California, in an opinion affirmed by the Ninth Circuit, have ruled that a combination which only fixes prices does not exceed the boundaries of the Capper-Volstead exemption. Both cases involved similar facts, because both arose from proceedings against the same entity, the Central California Lettuce Producers Cooperative (Central). Like RCMA, each of Central's twenty-two individual and corporate members held a seat on the board of directors and on the cooperative's executive committee. The committee met at least weekly to determine price policy which each member agreed to follow. Although Central advertised its own existence and at times of low sales engaged in some promotion of lettuce, generally each member handled its own lettuce and conducted its own sales program. Central also provided a conduit for the exchange of infor-

mation on lettuce production and on non-paying or complaining customers; however, "the primary activity of Central [was] to set prices or price ranges to which members [were] required to adhere in the sale of their lettuce." *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative,* 413 F. Supp. 984, 987 (N.D. Cal. 1976), *aff'd,* 580 F.2d 369 (9th Cir. 1978), *cert. denied,* 99 S. Ct. 873 (1979). The FTC found that it was "clear that the activities of Central and its members violate[d] Sec. 1 of the Sherman Act." *Central California Lettuce Producers Cooperative,* [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,234 (F.T.C.).

In both cases the question was whether Central qualified for the protections of the Capper-Volstead Act and section 6 of the Clayton Act even though its "marketing" activities appeared to be limited to price fixing alone. Both the FTC and Judge Orrick acknowledged that neither the legislature histories of the statues nor earlier cases had addressed this specific question; nevertheless, both ruled in favor of the cooperative.

Judge Orrick found support for his decision in *Maryland and Virginia Milk Producers Association v. United States,* 362 U.S. 458 (1960), in which Justice Black concluded from the legislative history that Congress intended the exemptions "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." *Id.* at 466. Since Justice Black stated that the activities set forth in section one of the Capper-Volstead Act were "among 'the legitimate objects' of farmer organizations,"

id., Judge Orrick concluded that "it is not necessary for a farmer association to engage in all of the enumerated activities to qualify for the exemption." 413 F. Supp. at 991.

The Ninth Circuit's opinion in *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), also pointed Judge Orrick to his conclusion. The two plaintiff cooperatives in *Treasure Valley* bargained in behalf of their members for standard contracts with potato processors. Each cooperative would negotiate with one of the two processors to which its members sold potatoes. The cooperatives agreed that each would then seek the same terms in its negotiations with the second processor. Although this activity appears far more substantial than what Central did for its members, Judge Orrick ruled that the Ninth Circuit's decision that the Capper-Volstead exemption protected the cooperatives from defendants' price-fixing counterclaim was "controlling" in Central's case. He looked primarily at the broad definition of "marketing" which the Ninth Circuit adopted: " 'The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standarizing, financing, risk bearing, and *supplying market information.*' " 497 F.2d at 215 (quoting *Webster's New Collegiate Dictionary*, 1953 Edition) (emphasis added in Ninth Circuit opinion). Judge Orrick found:

> The aggregate of activities of Central constitute "collective marketing" within the meaning of the phrase as defined in *Treasure Valley*. Here, as in

> *Treasure Valley*, Central was "supplying market information and performing other acts . . . involved in the transferring of title" of the produce. But, even in *Treasure Valley*, the *principal* function of the cooperative was to set prices.

413 F. Supp. at 992 (emphasis in original) (citations omitted). He called the collective bargaining done by the *Treasure Valley* cooperatives but not by Central "a distinction without a difference." *Id.*

RCMA neither bargains collectively for its members nor supplies them with market information. And, we have stated above that RCMA's ancillary activities are of no consequence to our decision. We note, however, that RCMA acts as a clearinghouse for the equitable distribution of production incentive differential income among the seven members. Moreover, the members apparently exchange market information informally at their monthly price-setting meetings. *See* Affidavit of Arthur D. Little at 11, ¶40 (filed Sept. 5, 1978). These activities, together with RCMA's price-fixing seem comparable to what Judge Orrick found adequate to entitle Central to protection.

More significant than any comparison of activities, however, is Judge Orrick's dicta:

> Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, know-

> ing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.

Id. He based this opinion on the legislative history, but also felt that: "Protection for price-fixing follows from the effect of Section 6 [of the Clayton Act] and Capper-Volstead in equating an agricultural cooperative and its members with an individual business entity since a single business enterprise may set for itself even wholly unreasonable prices without violating Section 1." *Id.* at 993 (citing *April v. National Cranberry Association*, 168 F. Supp. 919, 921-22 (D. Mass. 1958)). This reasoning and language give strong support to defendants' claims to summary judgment on Count I.

The FTC also found Central entitled to the Capper-Volstead exemption. It first ruled that a cooperative need not engage in all the activities specified in the statute, rather Congress had simply listed functions an agricultural cooperative "may" perform. The Commission then faced the question presented to Judge Orrick: Whether Central was engaged in "collective marketing."

The Commission found in the legislative history the congressional intent to allow farmers to organize into entities that would put them on a par with corporations but uncovered nothing to assist with the determination of whether Capper-Volstead protected an organization that did nothing but fix prices. *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,236 (F.T.C.). Its examination of judicial interpretations of the statute began with *Treasure Valley*

and Judge Orrick's decision in *Northern California Supermarkets*. The Commission's opinion acknowledged that latter's view that price fixing alone was protected by the statute, but concluded simply: "Whatever 'marketing' activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale." *Id.* at 21,237. It then turned to complaint counsel's argument that the statute protects only agricultural organizations that resemble corporations, but the Commission found that, "the principal cases relied on by complaint counsel readily accept intra-cooperative pricing agreements as a necessary incident of collective marketing. They do not establish a threshold for the cooperative's level of additional activity below which this conduct becomes illegitimate." *Id.* at 21,238.

The Commission's final conclusion rested on what it surmised Congress intended. It observed that Congress passed Capper-Volstead to confer on producer organizations the same advantages enjoyed by corporations, but that when it acted Congress believed that farmer incorporation was impossible. The Commissioner acknowledged that the explicit requirements of the statute should be strictly applied, nevertheless, it rejected the notion that farmers could obtain Capper-Volstead protection only by creating entities that resembled and peformed many of the same functions as a corporation. Thus an organization that meets the explicit statutory requirements and puts farmers in a position to bargain effectively with large buyers should be protected. How the farmers secure that position should, in the Commission's view, be largely irrelevant. "If, as in *Treasure Valley*, it

is sufficient merely for the cooperative to unite producers in 'collectively negotiating' over price, legal consequences should not attach if the cooperative presents the results of its decisions through each member rather than through a single agent representing each member." *Id.* at 21,239. Like Judge Orrick, the Commission found the statute applied to the lettuce growers' cooperative.

The reasoning of these cases is highly persuasive; we hold that section 1 of the Capper-Volstead Act exempts from the constraints of section 1 of the Sherman Act a qualified agricultural organization that does nothing but fix prices.

2. Count 2: Monopoly

Count II of the Amended Complaint alleges that defendants have violated section 2 of the Sherman Act, 15 U.S.C. §2, by monopolizing or attempting to monopolize the raw milk market from which plaintiff obtains its supply. Defendants contend that the Capper-Volstead Act protects them from a monopoly claim like Count II unless either of them has engaged in predatory practices. Since neither the Amended Complaint nor the discovery documents reveal actions which can be characterized as predatory, they argue they are entitled to judgment. We disagree with defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative; we deny their motions for summary judgment on Count II.

"The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth

or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Supreme Court has "defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market." *Id.* at 571 (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). The Sherman Act prohibition against attempts to monopolize is similar to the criminal law of attempt.

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result.

Swift and Co. v. United States, 196 U.S. 375, 396 (1905) (citation omitted).

Defendants argue that the Capper-Volstead Act permits qualified cooperatives to acquire monopoly power by legal means unless they engage in predatory practices. They contend that the legislative history of, and the cases interpreting, the Capper-Volstead Act in the context of monopoly claims, require plaintiff to show the standard elements of a monopoly claim as well as at least one predatory act by one of defendants. The strongest

support in the legislative history for this assertion is the rejection by Congress of an amendment offered during consideration of the Capper-Volstead Act. When it reported the bill to the full Senate, the Senate Judiciary Committee proposed to strike the present section 2 and substitute:

> [n]othing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under [the Federal Trade Commission Act].

As quoted in FTC Staff Study at 37. The Senate rejected the proposal.[3]

But, in the words of the FTC staff, "it would not be fair to conclude from the vote that the Senate wanted agricultural cooperatives to have monopoly power. Neither side in the debate relished the thought of agricultural cooperatives holding monopoly power and inflating consumer prices. The real issue was how monopoly cooperative associations should be controlled." FTC Staff Study at 38. After reviewing the entire legislative history, the FTC Staff concluded: "A fair distillation of Congressional sentiment as to cooperative size might then be: Cooperatives are free to attain the size necessary for efficient marketing and reduction of costs, but must not be allowed to inflate consumer prices through monopoly power." *Id.* at 40. In light of the general belief in Congress when the act was passed that the accumulation of monopoly power by agricultural cooperatives was highly unlikely, *id.*, we cannot agree with defendants claim that Congress intended Capper-

Volstead to give farmers greater freedom from the constraints of section 2 of the Sherman Act than corporations enjoy.

Defendants also rely on a series of cases in which courts have found agricultural cooperatives guilty of violating section 2 of the Sherman Act. Since all of these cases involved farmer organizations that had engaged in predatory practices, defendants argue that plaintiffs who sue qualified entities must show at least one act of this character in addition to proving the *Grinnel* elements. We have found no decision, however, in which plaintiff's case lacked evidence of predatory practices and suffered dismissal. We do not doubt that proof of predatory practices adds substantial weight to a plaintiff's monopoly claim, but we refuse to hold that it is a necessary element.

The case that begins the line defendants rely on is *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960). The defendant dairy association supplied about eighty-six per cent of the milk in the relevant market. In addition to showing this market power, the government alleged that the defendant had engaged in predatory practices to exclude, eliminate or attempt to eliminate competition from other individual producers or cooperatives.

> Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The

> statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association.

Id. at 468. The Court ruled that the Capper-Volstead Act did not bar this Sherman Act section 2 claim. After acknowledging that Congress intended the Capper-Volstead Act to allow agricultural cooperatives to do things that corporations were already permitted, the Court stated that this purpose, "does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." *Id.* at 466-67. Moreover, the Court quoted parts of the legislative history including: "In the event that associations authorized by this bill shall do *anything* forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law." *Id.* at 467 (quoting H. R. Rep. No. 24, 67th Cong., 1st Sess. 3) (emphasis added). And:

> The Solicitor of the Department of Argiculture testified that it was his "opinion that if the farmers want to create monopolies *or* want to engage in unfair practices in commerce, this bill certainly would not give them the right to do it, and they would have to get another bill.

Id. at 467 n.16 (quoting Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2373, 67th Cong., 1st Sess. 203) (emphasis added). The facts did not require the Court to distinguish between a simple monopolization that violated section 2 and a monopolization promoted by predatory practices. The Court's language and the basis of its decision—that the Capper-Volstead Act provides agricultural cooperatives no greater freedom from the antitrust laws than corporations enjoy—support the inference that the Court would deny summary judgment to defendants here.

Subsequent lower court cases have also involved monopolies promoted or maintained by predatory practices. In *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966), the court affirmed a jury verdict that the defendant milk cooperative had violated section 2 of the Sherman Act.

> The complaint charged the Association with monopolizing and attempting to monopolize the marketing of raw milk in the Dallas-Fort Worth area by (a) control of the supply, (b) control of transportation, (c) refusal to transport milk for non-members of the Association, (d) boycott and coercion against Metzger, (e) covert attempt to purchase Metzger, (f) refusal to sell raw milk to Metzger unless Metzger stopped purchasing from Association's competitors, (g) purchase of other milk plants.

Id. at 191. The court's survey of the record showed there was evidence to support these allegations as well as the verdict. In dicta the court acknowledged that Capper-

Volstead allowed farmers to act together "without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation." *Id.* at 194. This language recognizes that a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation.

The defendant milk cooperative in *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. No. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966), acquired the assets of a processor, engaged in predatory pricing and paid retail sellers secret rebates. In considering whether the cooperative violated section 2, the court pointed out that Capper-Volstead was intended to increase farmers' bargaining power, but the court applied the general rules of monopoly cases announced by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

> The exemption from the antitrust laws is designed to enable farmers, who had previously suffered from a lack of bargaining in the sale of their products, to form cooperatives in order to get better terms and prices for their produce. Therefore, defendant Sanitary's 55 to 60% control of raw milk in the St. Louis area was lawfully obtained. However, a lawfully-obtained power cannot be unlawfully used. Any use of monopoly power causes economic injury that the antitrust laws are designed to prevent. However, when a monopoly power, whether gained lawfully under the Capper-Volstead Act, under the patent laws, or by virtue of a natural monopoly, is

> used unlawfully, it gives rise to a violation of section 2 of the Sherman Act and amounts to unlawful monopolization, or attempt to monopolize.

241 F. Supp. at 483 (citation omitted). Concerning defendant's secret rebates, the court noted: "it is a predatory act *which shows evidence of* intent to monopolize under section 2 of the Sherman Act and constitutes part of a pattern of action aimed at monopolizing." *Id.* at 484 (emphasis added). The court recognized that the mere possession of monopoly power did not violate the antitrust laws, particularly in the case before it where the cooperative controlled only fifty-five to sixty per cent of the relevant market. But because the plaintiff had shown that defendant had specific intent to monopolize, it had established a section 2, attempt-to-monopolize violation.

There is language in the opinion which one might construe to mean that Capper-Volstead protects a cooperative that holds monopoly power and avoids predatory practices, but we think the better interpretation of the opinion as a whole is simply that a plaintiff can, with evidence of predatory practices, discharge its burden of showing intent to monopolize.

Defendants also rely on *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), and *Otto Milk Co. v. United Dairy Farmers Cooperative Association*, 388 F.2d 789 (3d Cir. 1967). Neither case supports their position. The Ninth Circuit in dicta did point out that the Capper-Volstead Act does not "immunize cooperatives engaged in competition-stifling practices from actions under the antimonopolization pro-

visions of the Sherman Act §2," 526 F.2d at 1202, but this hardly means that predatory practices are a necessary element to plaintiff's claim here. Moreover, the court recited the standard elements of a monopoly claim announced in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), when approving the trial court's jury instructions on that question. Even though the case involved monopolization of the distribution of fruit in Asia through an agreement with a non-exempt entity, not monopolization of production as in most agricultural cooperative cases, the court's application of *Grinnell* to an agricultural cooperative supports plaintiff's position here.

The only Sherman Act section 2 question before the *Otto Milk* court was whether plaintiffs had stated a sufficiently substantial claim under section 2 to support jurisdiction over a pendent state claim. The record showed that the cooperative had arranged picketing of grocery stores that sold plaintiff's milk, because the plaintiff purchased its raw milk from non-member producers. The court found substantial plaintiff's claim that the cooperative had attempted to monopolize based on "a deliberate, organized, determined maneuver to obtain a milk products monopoly in the particular market." 388 F.2d at 798. There is little in this case to comfort either party here.

The strongest statement supporting defendants' position appears in Judge Wyzanski's charge to the jury in *Cape Cod Food Prooucts, Inc. v. National Cranberry Association*, 119 F. Supp. 900 (D. Mass. 1954). Defendants make much of the statement that "it is not a violation of the Sherman Act or any other anti-trust act for a

Capper-Volstead cooperative to acquire a large, even a 100 per cent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling." *Id.* at 907. But the context in which this assertion appears reveals that Judge Wyzanski meant only to point out that monopoly power alone was insufficient to show a violation of section 2. In fact, in the next paragraph he states:

> On the other hand, it would be a violation of the law, and it would be a prohibited monopolization for a person or group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, or through a predatory practice, *or through the bad faith use of otherwise legitimate devices.*

In *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266 (D. Colo. 1964), the court made very clear that all Capper-Volstead does and all Judge Wyzanski intended was to shift the focus of antitrust analysis away from the individual members and onto the collective body as a single entity. In ruling that the cooperative alone could not be guilty of conspiracy that violated section 1 of the Sherman Act, the court stated:

> So far as the constituent producer-members of a Capper-Volstead cooperative are concerned, however, it appears probable, in the present state of the law, that the cooperative may lawfully acquire and exert significant market power—possibly even power conferred by monopoly status—so long as that power is acquired only by means of voluntary affiliation of producers with the cooperative. It is the cooperative, not its constituent members, which is the relevant entity.

Id. at 268. But, after an extended quote from Judge Wyzanski's charge, the court ruled that the cooperative alone could violate section 2.

> In the case of the §2 allegations made in the complaint the provisions of §2 must be dealt with separately. Section 2 embodies, first of all, a substantive prohibition, a prohibition which can be violated by a single business entity or any person acting on behalf of a business entity. . . .

Id. at 269.

Defendants have argued vigorously that the language of these cases indicates that courts should require plaintiffs to show that qualified cooperatives have engaged in predatory practices. Moreover, they assert that Congress intended Capper-Volstead to afford farmers the power to bargain effectively in the markets where they sell their produce; this statutory purpose would be frustrated, they claim, if courts imposed monopoly liability in the absence of predatory practices, because cooperatives fearing antitrust lawsuits would be reluctant to recruit a sufficient number of members to acquire the market power Congress intended them to have.

This fear may be real, but it does not justify affording cooperatives different treatment than corporations under section 2 of the Sherman Act. The legislative history of the Capper-Volstead Act as well as the cases that discuss it repeatedly demonstrate that Congress intended the Act to put farmers on an equal footing with the corporations they faced in the marketplace, not to give them an unfair advantage. Section 2 of the Sherman Act

was intended to prevent concentration of economic power and to promote competition. Judge Learned Hand has explained the importance of these ends:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.

United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). These considerations apply to agriculture and cooperatives no less than to industry and corporations; we decline to immunize agricultural cooperatives from competition. We hold that the Capper-Volstead Act does not require plaintiff to show that defendants have engaged in predatory practices; the elements of the claims plaintiff raises in Count II of its Amended Complaint are not changed because the defendants happen to be agricultural cooperatives.

3. Defendants' Supplemental Motions for Summary Judgment.

Defendants have filed supplemental motions for summary judgment which address plaintiff's claim for damages. To the extent that these motions are addressed to the price-fixing claim alleged in Count I of the Amended Complaint, we deny them as moot.

The sole indication that these motions are addressed to Count II appears in a footnote in defendant's memorandum which asserts:

> Fairdale's standing to claim monopolization in violation of Sherman Act §2 also is based upon Clayton Act §4, and the economic considerations of tenuous causation which apply to a claim of damage from purchases from competitors of a price-fixer in violation of Sherman §1 apply equally to a claim of damage from purchases from competitors of a monopolist in violation of Sherman §2. This is so because an analysis of proximate cause of a plaintiff's damage for violation of Sherman §1 or Sherman §2 each necessarily involves a determination of whether the defendants had sufficient market power to cause a competitor to raise its price following the lead of the price-fixers or monopolists. Consequently, the reasoning set forth in section I hereof, based upon the holding of the *Mid-West Paper* case, applies to exclude the damages in question whether the underlying alleged violation is grounded in section 1 or section 2 of the Sherman Act.

Memorandum of the Defendant Yankee Milk, Inc. in Support of Its Supplemental Motion for Summary Judgment Addressed to Plaintiff's Alleged Damages at 16 n.12 (filed July 11, 1979).

Defendants' reliance on *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), to support its claim to summary judgment on Count II is misplaced. In *Mid-West Paper* the Third Circuit ruled

that a plaintiff who purchased bags from the competitors of alleged price fixers could not recover damages from the price fixers. The court relied primarily on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Supreme Court held that indirect purchasers had no standing to sue price fixers. The Third Circuit pointed out that:

> *Illinois Brick* represents in effect the proposition that when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge. As explained in *Illinois Brick*, such an award not only deprives the violators of all the "fruits of their illegality" and deters further wrongdoing, it also compensates those victims who are most likely to assume the mantle of private attorneys general for the injuries they suffered.

Mid-West Paper, 596 F.2d at 585 (footnote omitted). Thus in price-fixing cases, the source and amount of defendants' wrongful benefits are significant factors in determining who may sue and how much they may recover. The court recognized, however:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anti-competitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable,

> and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Id. at 585 n. 47. We think this difficulty in identifying the benefits of a monopoly is sufficient to distinguish price-fixing from monopoly claims in the context presented by defendants' motions.

Moreover, the elements plaintiff must show to establish a Sherman Act section two claim obviate at least part of the problem of complexity of the trial which troubled the *Mid-West Paper* court. "Apart from its speculative nature, any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible." *Id.* at 585. At the trial in this case, plaintiff must show defendants have monopoly power in the relevant market. This evidence would be the first step in showing that defendants' conduct caused prices to rise throughout the relevant market and damaged plaintiff. We do not mean to minimize the difficulty plaintiff faces in establishing the causal link between defendants' alleged monopoly and the damages the supplemental motions address, however, we do not find this difficulty will result in sufficient complexity to justify summary judgment.

Defendants also contend that we should limit to forty-five days the time period for which plaintiff can recover

damages caused by defendants' alleged termination of plaintiff's milk supply. We find no merit to this part of defendants' supplemental motion. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir. 1979).

We deny defendants' supplemental motions for summary judgment.

4. Plaintiff's Motion for Summary Judgment on Defendant Yankee Milk's First Counterclaim.

Defendant Yankee Milk's first counterclaim seeks to recover damages from the plaintiff for alleged violations of the Agricultural Fair Practices Act of 1967 (AFPA), 7 U.S.C. §§2301-2306. Plaintiff has moved for summary judgment on the counterclaim on the ground that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In the memorandum in support of its motion, Fairdale first attacks the standing of Yankee to assert a claim under the AFPA and second, asserts that if Yankee does have standing, Yankee has not alleged facts that would support an AFPA cause of action.

A. *Standing*

The AFPA makes it unlawful for any handler knowingly to engage or permit any employee or agent to engage in certain prohibited practices enumerated therein.[4] Plaintiff is a "handler" by definition under the act. 7 U.S.C. §2302(a). The AFPA provides that any "person" injured in his business or property by reason of any violation, or combination or conspiracy to violate the provisions of the act by engaging in the forbidden practices may sue and recover damages therefor in an appropriate

district court without respect to the amount in controversy. 7 U.S.C. §2305(c). The term "person" includes individuals, partnerships, corporations and associations. 7 U.S.C. §2302(d).

Despite the rather clear language of the statute which seemingly permits Yankee to maintain its counterclaim plaintiff contends that defendant lacks the necessary standing to do so. The standing of a party to prosecute an action is determined by means of a two-part test as found in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). That test provides that a plaintiff must suffer an "injury in fact" and that such injury must be " 'arguably within the zone of interests to be protected or regulated' by the statutes" that are claimed to be violated. *Sierra Club*, 405 U.S. at 773. Plaintiff argues that Yankee meets neither part of the test and Yankee asserts the contrary.

Plaintiff relies on the legislative history of the AFPA to support its claim that the act was only intended to provide a remedy for individual producers against handlers who violate the act and not to provide a collective remedy for a cooperative association of dairy farmers such as Yankee. In view of its interpretation of the intent of the act, Fairdale asserts that Yankee is without standing to pursue its first counterclaim. Fairdale points to various remarks of Congressmen at the time the act was being considered for passage[5] as well as *Butz v. Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974) in which the Ohio district court stated after a

review of the legislative history that "the overriding purpose of Congress in enacting the Agricultural Fair Practices Act of 1967 was to protect the individual producer of milk in his right . . ., in effect, to unionize." *Id.* at 235.

Yankee states that it enjoys no existence separate from its members for the purpose of determining injury and that an allegation of injury to Yankee necessarily sets forth injury to its individual members. It finds support for this argument in the statement in *Sierra Club* that an "organization whose members are injured may represent those members in a proceeding for judicial review," 405 U.S. at 739, whereas an association which alleges injury to an abstract public interest may not.

We hold that Yankee has standing to maintain its counterclaim. We agree with *Butz* that the principal purpose of the AFPA was to permit producers to "unionize" by forming or joining cooperatives free from coercion, intimidation and other impermissible practices by handlers. We see no reason why the cooperative may not bring an action under the AFPA on behalf of its members alleged to have been collectively injured by activities prohibited by the act. The language of the act specifically includes among those who may sue for a violation of its provisions association as well as individuals and other business entities. We are satisfied that the words of the statute should be given their plain meaning, *United States v. Cooper,* 580 F.2d 259, 261 (7th Cir. 1978) (" 'when words are free from doubt they must be taken as the final expression of the legislative intent' " (citation omitted)); *Sheehan v. Scott,* 520 F.2d 825, 829 (7th

Cir. 1975) ("[w]ords in statutes must be given their common ordinary meanings.") See *Yates v. United States*, 354 U.S. 298, 305 (1957); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945); *United States v. Goldenberg*, 168 U.S. 95, 103 (1897). Yankee possesses the standing necessary to pursue its counterclaim.

B. *Genuine Issue of Material Fact*

We still must determine whether there is a genuine issue of material fact precluding judgment for Fairdale on the counterclaim as a matter of law.

> [O]n a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried [citations omitted]. Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed.2d 176 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute, *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970). This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. *Donnelly v. Guion*, 467 F.2d 290, 291 (2d Cir. 1972).

Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). *See First National Bank of Cincinnati v. Pepper*, 454 F.2d 626, 629 (2d Cir. 1972).

To determine whether Fairdale is entitled to judgment in its favor in light of the foregoing requirements, we examined the depositions and other documents filed in this cause and counsel's interpretations thereof as well as the other arguments that the parties have urged upon us.

The counterclaim itself merely states that Yankee "has reasonable grounds to believe that plaintiff did engage or permit its employees to engage in practices prohibited by §4 of the above-mentioned [Agricultural Fair Practices] Act, 7 U.S.C. §2303" followed by a verbatim recitation of the prohibited practices as stated in section 2303. Plaintiff contends that these vague allegations are insufficient to state a claim for violation of the AFPA. Yankee counters that its allegations are made sufficiently definite by its Answers to Certain Interrogatories of Fairdale, most notably number 57 of Plaintiff's Interrogatories addressed to the Defendant Yankee Milk, Inc.—Second Set, as well as Response 15 of Plaintiff's Response to Yankee's First Set of Interrogatories, certain deposition testimony referred to in Yankee's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment (filed October 2, 1978) and letter of Yankee's counsel to the court dated September 28, 1979 (filed October 2, 1979). Fairdale in a letter from its counsel to the court dated October 10, 1979[6] (filed October 22, 1979) in response to Yankee's letter states that Yankee has still presented no "issue in fact" for the

court's determination. It buttresses this assertion by certain exhibits attached to its letter including a newly filed affidavit of Robert T. Holden, president of plaintiff, dated October 10, 1979.

The gist of Yankee's counterclaim centers upon the activities of Fairdale immediately preceding and following the severance of its relationship with Yankee in late 1974. But Yankee is able to point to only one specific instance of Fairdale's alleged improper conduct. Such conduct involves a meeting arranged by Fairdale on December 19, 1974, with various producers, including certain Yankee members, at which Fairdale distributed a comparative price list which purported to set forth the prices for all alternative markets to which the producers attending could ship their milk. This list omitted the Connecticut price which was also available to the producers and which was higher than the price Fairdale was then paying. Fairdale acknowledges that the Connecticut price was not on the list given out at the meeting but refers to deposition testimony of Fairdale officials that the omission was unintentional because they were unaware that there were producers in their market area who were receiving the Connecticut price.

Eventually three of eleven Yankee producers[7] returned to Fairdale but only after they were free to do so. Two of these producers returned only after their contracts with Yankee were properly terminated according to their terms. This was after they attended another meeting with Fairdale in January, 1975, at which Fairdale handed out a price comparison that included the Connecticut

price. Fairdale also started to pay the Connecticut price to all of its producers prior to the time the Yankee producers returned to it.

Regardless of whether the omission of the Connecticut price on the December 19, 1974, handout was inadvertent or intentional, Fairdale asserts it did not violate any provisions of the AFPA. Based on the analysis contained in the October 10, 1979, letter from Fairdale's counsel, p. 2, we agree. Whether or not plaintiff's failure to inform can be considered a significant act of deception it simply does not rise to the level of "coercion" or "refusal to deal", 7 U.S.C. §2303(a), "discrimination", *id.* §2303(b), or "intimidation", *id.* §2303(c), against which the AFPA is designed to guard. Nor does it fit within the proscription of the remaining provisions of 7 U.S.C. §2303. Such conduct does not offer an inducement or reward to a producer for ceasing to belong to an association of producers, *id.* §2303(d), nor is it the making of a false report about the finances, management or activities of associations of producers or handlers, *id.* §2303(f).

In their letter of September 28, 1979, counsel for Yankee described four events between December 12, 1974, and January 15, 1975, which Yankee contends "creates a strong inference that Fairdale's acts, including the intentional omission [of the Connecticut federal order price], were calculated to induce the Yankee members supplying Fairdale to terminate the memberships with Yankee and continue as Fairdale suppliers." There is nothing improper, however, in a handler's dealing directly with a producer even though the producer is a member of an association, *Butz*, 386 F. Supp. at 237, provided

the handler does not act in a manner prohibited by the AFPA. The cumulative effect of the additional meetings and the fact that Yankee was not invited to participate simply does not bring Fairdale's conduct within the ambit of activities prohibited by the AFPA. We also do not believe that Yankee's conclusory and general answers to number 57 of plaintiff's second set of interrogatories adequately present a genuine issue of material fact respecting a violation of the AFPA. This is particularly so in light of the October 10, 1979, affidavit of Fairdale's president, Robert T. Holden, which expressly refutes Yankee's claim of impermissible conduct by Fairdale in those areas described by Yankee's answer to interrogatory number 57.

Yankee argues that its effort to explore further factual bases for its counterclaim has been impeded by Fairdale's failure to comply fully with discovery requests and that such failure deprives Fairdale of the right to summary judgment. Fairdale replies that it has fully responded to Yankee's discovery requests and Yankee's "failure to come up with facts evidencing a violation is solely because such facts do not exist, not because plaintiff has failed to respond to discovery requests." Whether or not Fairdale has responded to Yankee's various interrogatories and requests for production as fully as Yankee would like, we are persuaded that Fairdale has responded adequately and we cannot accept Yankee's argument that its inability to be more definite with respect to the underlying factual basis for its counterclaim results from Fairdale's inadequate responses.

Nothing in the documents that have been called to our attention demonstrates a factual question concerning a violation of the AFPA by Fairdale and Fairdale has sufficiently demonstrated that there is none. We are satisfied that Fairdale has met its burden of persuasion on the summary judgment motion. We recognize that Yankee, as the non-moving party has no burden to establish that there is such an issue for resolution on trial and, of course, all ambiguities must be resolved and reasonable inferences must be drawn in its favor. Nevertheless, the parties have engaged in extensive and intensive discovery proceedings since the outset of this matter and there has been ample time and effort expended by each for Yankee to have developed at least some evidentiary support for its first counterclaim if there were any.

We do not deem it sufficient for Yankee to simply rely on a claimed failure of Fairdale to respond to discovery. It has some obligation to point out to the court with at least a minimal degree of specificity those facts in dispute that would make summary judgment inappropriate. For instance, there are sources other than Fairdale, such as the producers involved in the transaction, whether they left or stayed with Yankee, who would presumably be cognizant of AFPA violations if they were any. We can, without shifting the burden of proof, consider Yankee's failure to refer to sources other than Fairdale as having a bearing on the issue before us, especially given the length of time the action has been pending and the extensive discovery efforts in which the parties have engaged over a four year period.

Since we consider Fairdale has met its burden and we can ascertain no factual issues to be resolved at trial and none have been called to our attention with respect to Fairdale's alleged violation of the AFPA, we grant plaintiff's summary judgment motion to Yankee's first counterclaim.

28 U.S.C. §1292(b)

We find that our decisions on both counts of plaintiff's Amended Complaint and Yankee's first counterclaim involve controlling questions of law as to which there are substantial ground for difference of opinion. Since reversal of our decision on Count I would render meaningless the four to six week trial which counsel anticipate, and since reversal of our denial of summary judgment on Count II would preclude such a trial, an immediate appeal from the order would materially advance the ultimate termination of the litigation. We note that this case is the kind of " 'protracted and expensive litigation, as in antitrust and similar protracted cases,' " *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741, 743 (4th Cir. 1963) (quoting 1958) U.S. Code Cong. & Ad. News at 5260-61), which Congress intended the 28 U.S.C. §1292(b) procedure to expedite if either or both of the parties elect to take advantage of it.

Conclusion

We deny plaintiff's motion for summary judgment on Count I of its complaint and grant its motion for summary judgment on defendant Yankee's first counterclaim. We grant defendants' motions for summary judgment on Count I and deny their motions on Count II; we also deny defendants' supplemental motions for summary judgment.

Dated at Burlington in the District of Vermont, this 1st day of November, 1979.

ALBERT W. COFFRIN
District Judge

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1128, 1412, 1413—September Term, 1979

(Argued June 16, 1980 Decided December 9, 1980)

Docket Nos. 80-7028, 7034, 7036

FAIRDALE FARMS, INC.,

Plaintiff-Appellant-Cross-Appellee,

—v.—

YANKEE MILK, INC. and REGIONAL COOPERATIVE MARKETING AGENCY, INC.,

Defendants-Appellees-Cross-Appellants.

Before:

VAN GRAAFEILAND and KEARSE, *Circuit Judges,* and NICKERSON, *District Judge.* *

Appeal from an order of the United States District Court for the District of Vermont, Coffrin, *J.*, granting

* Of the Eastern District of New York, sitting by designation.

summary judgment to defendants on plaintiff's cause of action under section 1 of the Sherman Act, 15 U.S.C. § 1, and denying summary judgment to the defendant on plaintiff's cause of action under section 2 of the Act, 15 U.S.C. § 2. That part of the order granting summary judgment is affirmed. That part of the order denying summary judgment is vacated, and the matter is remanded to the district court for further consideration.

FRED I. PARKER, Middlebury, Vt. (Langrock, Sperry, Parker & Stahl, Middlebury, Vt., Susan Humphrey, and Chapman & Clearwaters, Washington, D.C., Keith I. Clearwaters and Dudley H. Chapman, on the brief), *for Plaintiff-Appellant-Cross-Appellee.*

DAVID P. O'HARA, Syracuse, N.Y. (Bond, Schoeneck & King, Syracuse, N.Y., John M. Freyer and David R. Sheridan, on the brief), *for Defendant-Appellee-Cross-Appellant Regional Cooperative Marketing Agency, Inc.*

ANDREA LIMMER, Washington, D.C. (Attorney, Department of Justice, Washington, D.C., Sanford M. Litvack, Assistant Attorney General, and Barry Grossman, on the brief), *for United States of America as amicus curiae.*

FREDERICK U. CONARD, JR., Hartford, Ct. (Shipman & Goodwin, Hartford, Ct., H. Martyn Owen, Theodore M. Space,

Thomas D. Clifford and Peter W. Benner, on the brief), *for Defendant-Appellee-Cross-Appellant Yankee Milk, Inc.*

VAN GRAAFEILAND, *Circuit Judge:*

This is a certified appeal under 28 U.S.C. § 1292(b) from a decision and order of Judge Coffrin of the United States District Court for the District of Vermont. Plaintiff Fairdale Farms, Inc. appeals from the summary dismissal of its claim under section 1 of the Sherman Act, 15 U.S.C. § 1, that defendants Yankee Milk, Inc. and Regional Cooperative Marketing Agency, Inc. (RCMA) illegally fixed raw milk prices. Yankee and RCMA appeal from the denial of their summary judgment motions to dismiss plaintiff's claim that defendants monopolized and attempted to monopolize trade in raw milk in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.

We affirm that part of the order granting defendants summary judgment on the section 1 claim. We vacate that portion of the order dealing with the section 2 claim and remand to the district court for further proceedings consistent with this opinion.

Plaintiff Fairdale is both a producer and dealer-processor of milk. It is located near Bennington, Vermont and buys and sells in the Vermont, New York, and Massachusetts area. Yankee is a milk producers cooperative with a membership of approximately 6,000 New England farmers. In 1973 minimum dairy prices for the northeastern United States, set by the government under the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 608c(5), were not providing an adequate return

to the farmers. In order to secure prices with which their members could live, Yankee and six other area cooperatives organized RCMA as an agricultural cooperative marketing corporation, whose primary function was to establish prices for the member farmers' milk. Between 1973 and 1975, these prices were usually higher than the federal order prices. Since August 1975, RCMA has not established an over-order price.

Until 1974, Fairdale bought a large portion of its milk from Yankee members. However, in 1974 Fairdale objected to paying the over-order price and, when negotiations with defendants proved fruitless, discontinued its purchases from Yankee farmers. In 1976, Fairdale brought this suit charging defendants with price fixing, monopolizing, and attempting to monopolize. Defendants alleged as an affirmative defense that the Capper-Volstead Act, 7 U.S.C. §§ 291-292, protected them against liability for the conduct of which Fairdale complained.[1] The adequacy of this defense is the issue on appeal.

The Section 1 Count

Price fixing arrangements are generally held to be *per se* violations of section 1 of the Sherman Act. *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963). The Capper-Volstead Act provides, however, that farmers may act together in associations in collectively marketing their goods, and the associations may make

[1] Defendants also asserted a counterclaim against Fairdale for alleged violation of the Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306. The district court's dismissal of this counterclaim is not being considered on this appeal.

the necessary contracts to effect this purpose.[2] Fairdale does not contest Yankee's right under the Act to fix the prices its members charge. Confronted with Justice Black's opinion in *Maryland and Virginia Milk Producers Association v. United States,* 362 U.S. 458 (1960), Fairdale does not have much choice. Examining the legislative history of Capper-Volstead, Justice Black found that Congress intended to permit farmers to organize together to "fix prices at which their cooperative will sell their produce." *Id.* at 466.

Fairdale contends, however, that RCMA does not have the same price-fixing right as does Yankee, and advances two arguments in support of its contention. It asserts first that Capper-Volstead gives only single cooperatives, not associations of cooperatives, the right to fix prices. Second, it contends that a cooperative association organized for the sole purpose of fixing prices is not entitled to Capper-Volstead protection. The district

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2 The pertinent provisions of the Capper-Volstead Act read:

> Persons engaged in the production of agricultural products . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

7 U.S.C. § 291.

Capper-Volstead was an enlargement of section 6 of the Clayton Act, 15 U.S.C. § 17, which provided:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

court rejected both contentions for reasons with which we agree.

The Capper-Volstead Act permits the formation of "associations" which may perform marketing functions and which may have "marketing agencies in common." The district court concluded that RCMA was one or the other of these organizations and that "grave legal consequences" should not be visited upon it as the result of a *de minimis* organizational distinction. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). *See Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-17 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). Fairdale's first argument is based upon a misreading of the Act and was properly rejected by the district court.

Fairdale's second argument is predicated upon a hyper-technical reading of the statute. Capper-Volstead provides that farmers may act together in associations in collectively "processing, preparing for market, handling, and marketing" their products. Fairdale contends that RCMA must do more than just fix prices in order to get the benefit of this statute. In the only two prior proceedings in which this argument was made, it was rejected. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (per curiam), *cert. denied*, 99 S. Ct. 873 (1979); *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶ 21,337 (FTC). The establishment of price is an integral part of marketing. *Id.* at 21,237. It would be strange indeed if participation in this portion of the marketing process, standing alone, would subject a cooperative to antitrust liability, when the exercise of the full range of activities covered by

Capper-Volstead would not. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, supra,* 413 F. Supp. at 992.

We agree with the district court that Fairdale had no section 1 claim against the defendants. The district court did not err in granting the defendants' motion for summary judgment on this claim.

The Section 2 Count

Section 2 of the Sherman Act makes it unlawful for any person to monopolize, attempt to monopolize, or conspire with another to monopolize, trade. There is an inherent conflict between this provision and those of Capper-Volstead which legitimize the collective action of farmers in the marketing of their products. By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies. The Act places no limits on combination; it does not forbid farmers from combining after their cooperative reaches a certain size. For a court to impose such limits and hold cooperatives liable for treble damages if they run afoul of a judicial standard would discourage the growth of these cooperatives. The Capper-Volstead Act recognizes that farmer cooperatives may grow into monopolies and includes precautions to prevent abuse of monopoly power. Section 2 of the Act, 7 U.S.C. § 292, permits the Secretary of Agriculture to order a cooperative to cease and desist if it monopolizes or restrains trade "*to such an extent* that the price of any agricultural product is *unduly enhanced* by reason thereof. . . ." (emphasis added).

The district judge "[disagreed] with defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative," and stated that "a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation." Disregarding the fundamental differences between a cooperative and a corporation, the district judge subscribed to the corporate monopolization test of *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), which proscribes the willful acquisition of monopoly power that is not the result of "a superior product, business acumen, or historic accident." We believe that the district court misconstrued the congressional intent evidenced in Capper-Volstead.

Although agricultural cooperatives have existed in the United States since the early 1800's, until the twentieth century they were mostly small local organizations with little power to bargain effectively on behalf of their members. Moreover, their growth was inhibited by both state and federal antitrust laws. *Maryland and Virginia Milk Producers Association v. United States*, *supra*, 362 U.S. at 464. *See generally* Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975). When the Sherman Act was under consideration in 1890, an amendment was proposed that would have exempted agricultural cooperatives from the proscriptions of the Act. Although Senator Sherman did not believe that his bill applied to farmers' associations, he apparently was willing to accept the amendment. However, without explanation, it was deleted from the bill as enacted. *See* 1 Kintner, *Federal Antitrust Law* §§ 4.8, 4.9, 4.12 (1980). Whatever the reason for deletion, the

Sherman Act, as interpreted by the Supreme Court, *see Loewe v. Lawlor,* 208 U.S. 274, 301 (1908), was a strong deterrent to the development of large agricultural cooperatives.

The tremendous growth of the California fruit industry brought about a drastic change in the merchandising of farm commodities. When California growers discovered the advantages of collectively processing and marketing their perishable fruit, large-scale, single commodity cooperatives quickly assumed a dominant role in the industry. *See, e.g., Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra,* 370 U.S. at 28-29. Shortly after World War I, the concept of large-scale, cooperative commodity marketing began to spread to other parts of the country. Wheat, cotton, and tobacco growers, in particular, became involved in the regional commodity cooperative movement. Knapp, *The Advance of American Cooperative Enterprise* 7-12 (1973). *See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Association,* 276 U.S. 71 (1928). Legislatures in many states enacted enabling statutes excepting organizations of this type from the coverage of state antitrust laws. *Tigner v. Texas,* 310 U.S. 141, 145-47 (1940). The American Cotton Association was organized in 1919, and in 1920 a plan for the organization of state marketing cooperatives was adopted. An essential element of this plan, and one of the " '8' commandments of 'commodity cooperative marketing' ", was that each cooperative should "control a sufficient proportion of the entire crop to be a dominant factor in the market. . . ." Knapp, *supra,* at 9.

Congress was not unaware of what was taking place. Senator Walsh, the most vociferous opponent of Capper-Volstead's anti-Sherman features, directed the attention

of his colleagues specifically to the fact that 93 per cent of California's raisin growers were members of the Sun Maid Raisin Growers Association. *See* 62 Cong. Rec. 2164 (1922). Senator Capper pointed to the 1,100 member California Fruit Growers Exchange as the "type of cooperative that would find 'definite legalization' " under Capper-Volstead. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra,* 370 U.S. at 28. Clearly, cooperatives "of such size and general activities" were contemplated by the proposed Act. *Id.* at 29. Proponents of Capper-Volstead, the prototype of which was introduced in 1919, *see* H.R. 7783 and S. 845, 66th Cong., 1st Sess. (1919), were convinced that farmers needed congressional help and, if there was any doubt on this score, it was dispelled by the severe agricultural depression of 1920.

In the presidential election of 1920, both party platforms stressed the need for legislative protection of the cooperative movement. In 1921, Congress organized a Joint Commission of Agricultural Inquiry to investigate, among other things, the causes of the agricultural depression and the reason for the difference between the prices paid farmers and costs to consumers. Among the Commission's recommendations was the enactment of legislation to strengthen the legal position of cooperatives. Knapp, *supra,* at 21.

A national Agricultural Conference was convened by the Secretary of Agriculture in January 1922, at which President Harding spoke. He assured the conferees that they would be afforded "ample provision of law under which they [might] carry on in cooperative fashion those business operations which lend themselves to that method. . . ." *Id.* at 23. The Conference's Committee on the Marketing of Farm Products recommended "the

formation of strongly organized cooperative associations of farmers, preferably on a commodity basis." *Id.* at 24.

It is little wonder, then, that Capper-Volstead and the major pieces of farm legislation that followed it strongly supported the cooperative movement. In Capper-Volstead, Congress did not simply broaden the scope of section 6 of the Clayton Act, 15 U.S.C. § 17, so as to bring cooperatives issuing capital stock within that section's antitrust exemptions. Where section 6 spoke only in terms of cooperative purposes, *i.e.*, "mutual help", Capper-Volstead spelled out the broad range of activities in which the cooperative might engage, *i.e.*, "processing, preparing for market, handling, and marketing." *See National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 824-25 (1978).

In the Cooperative Marketing Act of 1926, 44 Stat. 802 (1926) (current version at 7 U.S.C. §§ 451-457), Congress authorized the Secretary of Agriculture to establish a division of cooperative marketing. 44 Stat. 802. That division was to render services to agricultural cooperatives, to confer and advise with producers desirous of forming cooperatives, and to promote the knowledge of cooperative principles. *Id.* at 802. Cooperative associations were also authorized to exchange and disseminate market and economic information among themselves. *Id.* at 803.

The declared policy of the Agricultural Marketing Act of 1929, 46 Stat. 11 (1929) (current version at 12 U.S.C. §§ 1141-1141j), was to promote the effective merchandising of agricultural commodities "so that the industry of agriculture [would] be placed on a basis of economic equality with other industries. . . ." 46 Stat. 11. This would be accomplished in part "by encouraging the organization of producers into effective associations or

corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies." *Id.* The Federal Farm Board, created by the Act, was authorized to make loans to cooperatives to assist them in "extending" their membership by educating producers in the advantages of cooperative marketing. *Id.* at 14. If, in the judgment of the Board, the producers of any commodity were "not organized into cooperative associations representative of the commodity", the Board was authorized to make the benefits of the Act available to other cooperatives dealing in the same commodity. *Id.* at 18.[3]

The Farm Credit Act of 1933, 48 Stat. 257 (1933), authorized the creation of twelve "Banks for Cooperatives", which were authorized to make loans to cooperative associations for most of the purposes set forth in the Agricultural Marketing Act. 48 Stat. 257. Specifically included within these purposes was the "effective merchandising of agricultural commodities." *Id.* at 265.

As late as 1968, with the enactment of the Agricultural Fair Practices Act, Pub. L. No. 90-288, 82 Stat. 93 (1968) (current version at 7 U.S.C. §§ 2301-2306), Congress continued to recognize the need for stronger and more effective marketing and bargaining associations of farmers. *See* [1968] U. S. Code Cong. & Ad. News 1869. Congress declared that the "marketing and bargaining position of individual farmers will be ad-

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3 The first chairman of the Farm Board promptly declared that "[t]he Board believes that it can be of great assistance to American farmers by encouraging the development of large-scale, central cooperative organizations." Knapp, *supra*, at 123.

versely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law", 82 Stat. 93, and forbade any coercive practices by handlers which would interfere with the farmers' exercise of this right. *Id.* at 94. *See Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974).[4]

It is apparent from these statutes that agricultural cooperatives were "a favorite child of Congressional policy." 5 Toulmin, *Antitrust Laws* § 6.1, at 334 (1950); *Stark v. Brannan*, 82 F. Supp. 614, 617 (D.D.C. 1949). "Moreover, there is persuasive evidence that Congress'

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[4] *See also*

a) the Agricultural Adjustment Act of 1933, § 8(2), 48 Stat. 34 (1933) (current version at 7 U.S.C. §§ 601-604, 607-623), which empowered the Secretary of Agriculture to enter into marketing agreements with associations of producers, such agreements not to be held in violation of the antitrust laws;

b) the Agricultural Adjustment Act of 1935, § 16(b)(1), 49 Stat. 767 (1935), requiring the Secretary of Agriculture to accord such recognition and encouragement to producer-owned and producer-controlled cooperatives as would be in harmony with the policy toward such cooperatives already set by Congress, *see United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 562-64 (1939);

c) the Robinson-Patman Anti-Discrimination Act, § 4, 49 Stat. 1528 (1936) (current version at 15 U.S.C. §§ 13, 13a, 13b, 21a), which permitted cooperatives to return net earnings and surplus to their members, producers and consumers in proportion to their purchases or sales;

d) the Motor Carrier Act, 1935, § 203(b), 49 Stat. 545 (1935), which exempted motor vehicles controlled and operated by cooperative associations from most of the Act's provisions;

e) the 1939 Internal Revenue Code, § 101(12)(A), 53 Stat. 33-34 (1939) (current version at 26 U.S.C. § 521), which exempted certain farmers cooperatives from taxation;

f) the Investment Company Amendments Act of 1970, § 27(c), 84 Stat. 1435 (1970), which exempted certain farmers cooperatives from the registration requirements of the Act;

g) the National Agricultural Marketing and Bargaining Act of 1971, 9 Harv. J. Leg. 498 (1972) (proposed but not enacted).

concern for protecting contract growers vis-a-vis processors and handlers has not abated." *National Broiler Marketing Assn. v. United States, supra,* 436 U.S. at 837. (Brennan, *J.*, concurring). The consistent tenor of the enactments shows that Congress wanted and expected farmers to be represented by strong and effective cooperatives, so extensively organized as to be representative of individual commodities. Unity of effort was encouraged in order to give farmers the same "unified competitive advantage" available to businessmen acting through corporations. *Maryland and Virginia Milk Producers Association v. United States, supra,* 362 U.S. at 466. As Senator Capper himself expressed it, when he successfully opposed Senator Walsh's proposed amendment to Capper-Volstead that would have prohibited the creation of cooperative monopolies, *see* S. Rep. No. 236, 67th Cong., 1st Sess. (1921), "no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates." 62 Cong. Rec. 2058 (1922).

In short, when Congress enacted the Capper-Volstead Act, it did not intend to prohibit the voluntary and natural growth that agricultural cooperatives needed to accomplish their assigned purpose of effective farmer representation. That farmers' legitimate desires for unity of effort would incorporate of necessity a concept of corporate aggrandizement did not *per se* make this method of cooperative growth illegal. *See United States v. Rock Royal Co-op, Inc., supra,* 307 U.S. at 560.

This is the interpretation that has been placed upon Capper-Volstead by practically every scholar in the antitrust field.[5] This is how those courts which have directly

[5] *See* 1 Areeda & Turner, *Antitrust Law* ¶ 228d (1978); 1 Callman, *The Law of Unfair Competition Trade Marks and Monopolies*

addressed the issue have construed the Act. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra,* 370 U.S. at 24, the Court noted with apparent approval that portion of the district court's charge which stated that cooperatives could lawfully have a monopoly of the fruit and products in which they dealt.[6] In *Maryland and Virginia Milk Producers Association v. United States, supra,* 362 U.S. at 465, the Court said that farmers might act together in cooperative associations without the associations as such being illegal under the antitrust laws "as they otherwise might have been." Justice White expressed the same thought when he said that "[t]he assistance offered farmers by the Capper-Volstead Act was to allow combination in a way that would otherwise violate the antitrust laws," and concluded that the end result was a "bilateral monopoly" that benefited both the producer and the consumer. *National Broiler Marketing Assn. v. United States, supra,* 436 U.S. at 842, (White, *J.*, dissenting). *See also Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra,* 497 F.2d at 216 n.11; *Sunkist*

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§ 15.2(a) (1967 & Cum. Supp. 1979); 2 Kintner, *Federal Antitrust Law* § 17.5, at 517-18 (1980); Mueller, *The National Antitrust Commission: Implications for Cooperatives*, No. 37 (Dept. of Agricultural Economics, University of Wisconsin-Madison, September 1979); 5 Toulmin, *Antitrust Laws* § 6.13 (1950); 7 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 51.08[3][b] (1980); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 Ad. L. Rev. 455, 460 (1969-1970).

6 The district court actually charged that "[t]he defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1, 19 (9th Cir. 1960), *rev'd*, 370 U.S. 19 (1962).

Growers, Inc. v. F.T.C., 464 F. Supp. 302, 309 (C.D. Cal. 1979); *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266, 268 (D. Colo. 1964); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954); *United States v. Dairy Co-Op Ass'n*, 49 F. Supp. 475 (D. Ore. 1943); *United States v. King*, 250 F. 908, 910 (D. Mass. 1916).

Even the Federal Trade Commission, ever in the vanguard of the attack on monopolization, has stated that if an agricultural cooperative attains a monopoly position (even 100 percent) "without resort to predatory or anti-competitive practices, but through natural growth or the voluntary affiliation with or attraction of new members, no illegality would attach." *See Hearings on Antitrust Aspects of Food Price Increases Before the Sub-Comm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 715 (1973).

Of course, a cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harassment, *Otto Milk Co. v. United Dairy Farmers Cooperative Association*, 338 F.2d 789, 797 (3d Cir. 1967), boycotts, *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189, 195-96 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966), coerced membership, *see Gulf Coast Shrimpers and Oystermans Association v. United States*, 236 F.2d 658, 665 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956), and discriminatory pricing, *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420, 423-24 (2d Cir. 1968). Neither may it use its legitimately acquired monopoly power in such a manner as to stifle or smother competition. *Maryland and Vir-*

ginia Milk Producers Association v. United States, supra, 362 U.S. at 463.

> "[M]any anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even 'honestly industrial.'" *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied,* 100 S. Ct. 1061 (1980) (citations omitted).

In refusing to dismiss the section 2 claims, the district court relied on *Grinnell v. United States, supra,* which stated the following requirements for a monopolization claim:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

384 U.S. at 570-71. Our review of the above authorities persuades us that the effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of such cooperatives and places no

limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," *id.*, it is exactly what Capper-Volstead permits.

We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves. *Maryland and Virginia Milk Producers Association v. United States, supra*, 362 U.S. at 465. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635 (1975).

That part of the district court's order which granted defendants summary judgment on plaintiff's claim of a section 1 Sherman Act violation is affirmed. Because it is not clear whether the district court denied defendants' motion for summary judgment dismissing the section 2 count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown, that part of the order is vacated, and the matter is remanded to the district court for reconsideration consistent with the principles set forth in this opinion. We express no opinion concern-

ing the district court's ultimate resolution of this portion of defendants' summary judgment application.[7]

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[7] There are those who contend that the economics of farming have changed so drastically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power. *See* Toulmin, *supra* note 5, at 334; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341, 381-89 (1975). It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute.

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No. 80-1523

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

FAIRDALE FARMS, INC.,
Petitioner,

v.

YANKEE MILK INC.
and
REGIONAL COOPERATIVE MARKETING AGENCY, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the setting of price for raw milk by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.

2. Whether the Capper-Volstead Act and Section 6 of the Clayton Act give farmers the right to seek, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives, in the absence of competition-stifling or otherwise predatory practices.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Yankee Milk, Inc. ("Yankee") and Regional Cooperative Marketing Agency, Inc. ("RCMA") respectfully request that this Court deny the Petition of Fairdale Farms, Inc. ("Fairdale") for review of the opinion of the United States Court of Appeals for the Second Circuit entered December 9, 1980.

COUNTERSTATEMENT OF THE CASE

Fairdale's statement of the case contains considerable material of marginal, if any, relevance to the issues presented by the Petition. Fairdale's description of the facts at times goes beyond the record of the case, and many assertions in it remain a matter of dispute between the parties.[1]

Because the brief introductory statement contained in the Court of Appeals' opinion encompasses all facts necessary to a resolution of the issues presented by the Petition, Yankee and RCMA will not attempt a detailed counterstatement of the case, but rather simply quote that portion of the Court of Appeals' opinion, for this Court's convenience of reference, as follows:

> "Plaintiff Fairdale is both a producer and dealer-processor of milk. It is located near Bennington, Vermont and buys and sells in the Vermont, New York and Massachusetts area. Yankee is a milk producers cooperative with a membership of approximately 6,000 New England farmers. In 1973 minimum dairy prices for the northeastern United States, set by the government under the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. §608c(5), were not providing an adequate return to the farmers. In order to secure prices with which their members could live, Yankee and six other area cooperatives organized RCMA as an agricultural cooperative marketing corporation,

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[1] For example, the parties have substantial differences with respect to the actual extent of RCMA's marketing functions and the degree of market power actually possessed by Yankee and RCMA during the relevant time period; Fairdale fails to note that Fairdale continually refused to pay RCMA prices and unilaterally elected to terminate purchases from Yankee members; and Yankee and RCMA strongly contest the damage claims which Fairdale has asserted.

whose primary function was to establish prices for the member farmers' milk. Between 1973 and 1975, these prices were usually higher than the federal order prices. Since August 1975, RCMA has not established an over-order price.

"Until 1974, Fairdale bought a large portion of its milk from Yankee members. However, in 1974 Fairdale objected to paying the over-order price and, when negotiations with defendants proved fruitless, discontinued its purchases from Yankee farmers. In 1976, Fairdale brought this suit charging defendants with price fixing, monopolizing, and attempting to monopolize. Defendants alleged as an affirmative defense that the Capper-Volstead Act, 7 U.S.C. §§291-292, protected them against liability for the conduct of which Fairdale complained. The adequacy of this defense is the issue on appeal." (footnote omitted) (Pet. App. 40a-41a).

ARGUMENT

Introduction

Fairdale makes two arguments in support of its contention that certiorari should be granted. It contends that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court and, further, that the Court of Appeals' decision conflicts with prior decisions of this Court interpreting the Capper-Volstead Act.

Yankee and RCMA respectfully submit that the construction of the Capper-Volstead Act set forth in the Court of Appeals' opinion is so clearly correct that review by this Court is not called for. They further submit that the questions presented for review are settled and need not be reviewed by this Court because the opinion of the Second Circuit below:

1. Does not conflict with the decision of any other circuit, but is in harmony with decisions of the Ninth Circuit and the Federal Trade Commission which recognize the right of cooperatives and associations such as RCMA to establish prices for agricultural products, without more.

2. Does not conflict with any decision of this Court and is entirely consistent with the leading cases decided by this Court construing the Capper-Volstead Act, including *United States v. Borden Co.*, 308 U.S. 190 (1939); *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, *reh. den.* 370 U.S. 965 (1962) and *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978).

I.

THE CAPPER-VOLSTEAD ACT AUTHORIZES PRICE-SETTING BY FARMERS, THEIR ASSOCIATIONS AND COMMON MARKETING AGENCIES OF THEIR ASSOCIATIONS.

Fairdale asserts that a common marketing agency, all of whose member cooperatives are qualified Capper-Volstead associations, organized for the sole purpose of establishing prices for the produce of such members is not entitled to Capper-Volstead protection.[2] While Fairdale's statement of the Questions Presented assigns particular significance to RCMA's alleged role as a Capper-Volstead "marketing agency in common," its fundamental position is that "whatever RCMA is called under the Capper-Volstead Act, it only has a 'right' to price fix if such activity is inherent in other collective activity it performs." See Petition, at footnote 11, page 8. Further, Fairdale ignores the finding of the courts below that RCMA is either an association or a marketing agency in common. (Pet. App. 4a, 43a).

Fairdale's argument has been the subject of litigation in a number of federal forums, including two district courts, two courts of appeals and the Federal Trade Commission, and has in each such case been rejected, without dissent, following careful consideration on the basis of the relevant statutory language, the legislative history of that language and common sense. *See Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-217 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (per curiam),

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[2] As is noted, *supra*, at footnote 1, the parties are in dispute as to the actual extent of RCMA's marketing functions. See the District Court's opinion, at Pet. App. 9a, detailing RCMA functions in addition to price-setting.

cert. denied, 439 U.S. 1090 (1979); *Central California Lettuce Producers Cooperative,* 1977 Trade Reg. Rptr. (CCH) ¶21,337 (FTC), and the decisions below. Further, this Court has ruled that combinations between associations of farmers are protected. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 29 (1962). *See also Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra.* These decisions establish beyond cavil that the setting of prices by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THE CAPPER-VOLSTEAD ACT PERMITS AGRICULTURAL PRODUCERS AND THEIR ASSOCIATIONS AND MARKETING AGENCIES TO COMBINE TO MARKET THEIR PRODUCTS COLLECTIVELY AND, IN DOING SO, TO SEEK AND EXERCISE MONOPOLY POWER, SO LONG AS THEY DO NOT ENGAGE IN COMPETITION-STIFLING OR OTHERWISE PREDATORY ACTIVITIES. ITS DECISION IS ENTIRELY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals examines in considerable detail the relationship between the Capper-Volstead Act and Section 2 of the Sherman Act. Its careful review focuses on the language of Capper-Volstead[3], its legislative history, the long background of congressional

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[3] It should be noted that the Petition, at pp. 4-5, omits in its list of relevant statutory materials Section 2 of the Capper-Volstead Act, 7 U.S.C. §292, a provision quoted and relied upon in significant part by the Court of Appeals in construing the Act. See Pet. App. 44a.

support for the cooperative movement and the course of court and Federal Trade Commission construction of the Act. The court's opinion persuasively demonstrates that Congress intended to allow farmers to acquire, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives.

As the Court of Appeals observed (Pet. App. 52a), this Court has spoken regarding this question in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 24 (1962), where the Court noted with apparent approval that portion of a district court's charge which stated that cooperatives could lawfully have a monopoly of the products in which they dealt, and in *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 465 (1960), where this Court stated that farmers could act together in cooperative associations without the associations as such being illegal under the antitrust laws, "as they might otherwise have been."

Nothing in the history of the Act and its subsequent construction supports Fairdale's position that Capper-Volstead does not protect combination of producers or associations involving the achievement and exercise of monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), upon which Fairdale places principal reliance, does not address, or even touch upon, the scope of the Capper-Volstead exemption. *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911) (Petition, at footnote 7), holding refining industry combination to be unlawful, is precisely the kind of application of the Sherman Act which necessitated the adoption of Capper-Volstead to permit farmer combination to achieve market power. Fairdale completely misses the point of *United States v. Borden Co.*, 308 U.S. 190 (1939), *i.e.* that, while farmer and association combination is permitted, their combination in restraint of trade with non-farmers, who are not protected by Capper-Volstead, is barred. Fairdale ignores the central thrust of the other two Capper-Volstead cases it cites, *Case Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *National*

Broiler Marketing Association v. United States, 436 U.S. 816 (1978). Both cases recognize that Capper-Volstead constitutes a very significant exemption from the operation of the Sherman and Clayton Acts, and, consequently, carefully restrict the availability of its benefits to those parties clearly intended by Congress to be protected by the Act, *i.e.*, farmers and their associations and marketing agencies in common. Unlike those cases, there is here no question but that the acts of formation and combination challenged were carried out exclusively by farmers and their organizations.[4]

This Court has expressly recognized that the Capper-Volstead Act is an "exception to the generality of monopoly prohibitions." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 389 n.14 (1956). The construction of the Capper-Volstead Act contended for by Fairdale contradicts this generally understood purpose of the legislation. The Court of Appeals was correct in rejecting Fairdale's arguments and holding that Capper-Volstead permits the acquisition and exercise of monopoly power by farmers and their cooperatives through the formation, growth and combination of those associations and their common marketing agencies.

---

[4] Fairdale contends that the Court of Appeals erred in requiring a showing of "predatory" activity where a Capper-Volstead cooperative is charged with monopolization. To the contrary, the Court's requirement of such showing and its statement that a cooperative may not "use its legitimately acquired monopoly power in such a manner as to stifle or smother competition" are simply a recognition on its part that, as a general proposition, it is necessary for a party to show "anticompetitive conduct" to prevail on a monopolization claim. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271-276 (2d. Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The Court of Appeals' decision does not deal directly or in detail with anticompetitive conduct issues because the District Court certified the case under §1292 as one in which "neither the amended complaint nor the discovery documents reveal action which can be characterized as predatory" (Pet. App., at p. 12a), and which therefore raised the question whether farmers may seek and maintain monopoly power through the formation and combination of Capper-Volstead qualified organizations where they do not, in doing so, engage in anticompetitive activity against other participants in the market.

Acceptance of the novel theories advanced by Fairdale in its Petition would contravene the plain language of the Capper-Volstead Act and Section 6 of the Clayton Act and the prior opinions of this Court, and would destroy the fundamental assumptions upon which farmers themselves have based nearly 60 years of cooperative organization and growth.

CONCLUSION

Respondents respectfully submit that the petition should be denied in all respects.

Respectfully submitted,

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No. 80-1523

IN THE

Supreme Court of the United States

October Term, 1980

FAIRDALE FARMS, INC., *Petitioner,*

vs.

YANKEE MILK, INC., and REGIONAL COOPERATIVE MARKETING AGENCY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This Brief is submitted in reply to the Brief for the United States as *Amicus Curiae* which was filed in response to the Court's invitation to the Solicitor General to express the views of the United States. This reply brief is necessitated by a serious misunderstanding of the facts of this case on which the Solicitor General bases his view of the pertinent law.*

* While Plaintiff Fairdale Farms, Inc. obviously disagrees with much of the Solicitor General's interpretation of the applicable case law, it believes that the original Petition adequately addresses the relevant cases.

This case is indisputably *not* a case where a dairy cooperative acquired and maintained power *through the voluntary enrollment of all producers in its marketing area.* (Brief of U.S., pp. 1, 8, 14). Even Defendants have never maintained this position. Defendant Yankee Milk, Inc. ("Yankee") gained its market power (within the statute of limitations period) through merger of the three largest New England dairy cooperatives, the eventual acquisition of a fourth dairy cooperative, and an affiliation agreement with another large cooperative operating in New York and New Jersey whereby Yankee controlled this coop's New England producers. Defendant Regional Cooperative Marketing Agency, Inc. ("RCMA") gained its market power through a combination of cooperatives, federations of cooperatives, and a common marketing agency. In response to Defendants' Motions for Summary Judgment, Plaintiff Fairdale Farms, Inc. ("Fairdale") produced evidence that both the merger which formed Yankee and the formation of RCMA were done with the deliberate purpose of gaining market power sufficient to impact New England milk prices and to eliminate competition. Thus, the case involves much more than the "voluntary enrollment" of farmers.

The formation of Yankee Milk was first discussed by two of Yankee's predecessor coops, who then commissioned a study by the Springfield Bank for Cooperatives to examine the advantages of the two coops combining. It was "the unequivocal conclusion of this study . . . that a complete combination of [the two coops] at the earliest possible time will be in the best interest of the producer members. This conclusion is based largely upon the substantial magnitude of the economic advantages and improvement in bargaining power to be gained by combining the two enterprises." The study further stated, "With the merger of [the two coops], two of the principal competitors in the market will be eliminated."

The predecessor coops then drew up a STATEMENT OF POLICY, which Yankee has indicated sets forth the purposes of its formation. The STATEMENT's list of goals include:

> (a) The operation of the new organization to enhance blend prices to the greatest degree possible.

and

> (d) Working in all legitimate ways with similar organizations to gain further bargaining strength for dairy farmers.

Similarly, the formation of RCMA was for the purpose of raising prices. RCMA described its formation in answers to interrogatories:

> In early 1973 the Federal Order prices were lagging substantially behind the spiralling costs facing dairy farmers. Dairy farmers were going out of business and a possible shortage of milk and dairy products was looming on the horizon. Members of the New York-New England Dairy Cooperative Coordinating Committee began discussing possible alternatives. *It was determined that an organization needed to be formed that would provide the framework within which the cooperatives could work to establish realistic price levels for milk.* [Emphasis added.]

Both Yankee and RCMA have made extensive efforts to recruit new members. In addition, Yankee has adopted a marketing program designed to strengthen its market dominance. Its first provision is:

> 1. All members will be signed to a uniform and strong membership agreement with the cooperative, giving the cooperative the right to market the milk of its members.

Under Yankee's membership contract, Yankee, rather than acting as an agent to sell its members' milk to handlers, purchases its members' milk. The contract con-

tains strong penalties if the member sells his milk elsewhere, the member agrees to pay all costs and fees in an action Yankee brings to enforce the agreement, the member agrees that Yankee is entitled to an injunction to prevent the breach of the contract, and also agrees to an automatic yearly renewal unless terminated by notice 45 days prior to the anniversary date. Yankee has brought several lawsuits against farmers to enforce its contracts. The obvious value to Yankee of having such a strong membership contract is that it solidifies the control over the milk that is so essential to bargaining strength.

Another aspect of the program is:

> 2. All amounts due from handlers for milk received by them from members will be collected by the cooperative, and all payments to individual members will be made on checks written and issued by the cooperative.

The Springfield Bank study had recommended:

> One of the most effective ways of repeatedly demonstrating that the cooperative is performing worthwhile services for members is to mail to members their checks. The receiving of Combined Cooperative milk checks by members would visibly demonstrate that it is the cooperative which is purchasing and selling members' milk and this, coupled with other member services, *would greatly strengthen the ties between the cooperative and members and would weaken the ties between handlers and members.* [Emphasis added.]

The control over hauling, often done by handlers or independent haulers, is another way of strengthening member ties to the coop, rather than to such haulers or handlers. Thus, another phase of Yankee's marketing program is:

> 4. The pick-up and trucking of members' milk from farm to first market destination will be controlled by the cooperative. To accomplish this the cooperative could, if desirable, own the trucks used for hauling. In areas where equipment is not owned, the cooperative would exercise control over independent haulers in order to provide greater efficiency in a total marketing program.

Yankee also included in its marketing program a provision that:

> 6. The cooperative will attempt to develop a capacity of supplying the full needs of as many handlers as possible.

The strategic advantage of supplying the full needs of handlers is obvious, as it leaves the handler at the mercy of its supplier for fear of a sudden cut-off.

Another very significant aspect of Yankee's operation is "balancing" or handling of surplus milk. Yankee is also a milk handler engaged in the processing of milk into dairy products. Its marketing program contains provisions as follows:

> 5. The cooperative will exert control over reserve supplies of milk through the use of its plant facilities or otherwise.
>
> . . .
>
> 7. The cooperative will provide adequate facilities for the efficient utilization of milk and milk products ~~not needed in the market place,~~ either seasonably or day-to-day, and will set up a marketing program designed to market these products at the greatest value to all the members.

Yankee uses its plant facilities to process surplus milk into manufactured products which have a longer storage life, and therefore can avert a price decrease because of excess fluid milk on the market. Yankee has repeatedly

claimed credit for "successfully balancing for all producers in the New England market", but notes that this is contingent on Yankee having upwards of 70% of the producers for the given markets. Yankee has also acknowledged that this balancing function has enabled RCMA to charge its over order premiums.

RCMA pricing activity was discussed in the original Petition, but deserves some additional comment in reference to the Section 2 claim. RCMA member cooperatives were, of course, able to collect substantial premiums (up to $1.45 above a price of $10.32 per hundredweight of fluid milk), and maintain them even at a time when the market would have brought about a price decrease. Yankee has admitted that its market dominance was necessary to enable it to collect the premium, the best evidence of this being that RCMA was unable to collect the premium in the larger New York-New Jersey market or on Class II (nonfluid) milk products which compete on a regional and national basis.

In addition to the above factors, Fairdale objected in its Complaint to a "pull order" issued by Yankee when Fairdale balked at paying the RCMA premium. Yankee instructed its Fairdale producers not to let Fairdale pick up their milk the next day. Although this order was subsequently rescinded when Fairdale learned of it and protested, it brought to Fairdale's attention in no uncertain terms Yankee's intention to use its market position to enforce the RCMA price. As Fairdale's expert testified in deposition, in the milk business where the supply is perishable and has to come in regularly, a handler must be assured of an ongoing supply to remain a viable, healthy concern and meet its supply commitments. Even Yankee's expert, a former Federal Milk Market Administrator, admitted that a shut-off of supply with one day's notice was unheard of in the industry.

Thus, this case arises in a factual posture of a systematic program to enhance and solidify market dominance, enhancement of prices because of market dominance, and conduct aimed at using the market dominance to enforce the prices. And, it should be noted that this all took place within a time period of two and a half years from the formation of Yankee (RCMA was formed one year later) to the break-off of relations between Yankee and Fairdale.

In conclusion, the Solicitor General's reliance on an assumption that Fairdale only challenges voluntary enrollment of members under Section 2 is erroneous. The above facts were presented to both the District Court and the Second Circuit Court of Appeals and have formed the factual framework in which both Courts reached their decisions.

Respectfully submitted,

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Certificate of Service

We, Fred I. Parker, Esq. and Susan F. Eaton, Esq., members of the law firm of Langrock Sperry Parker and Stahl, P.O. Drawer 351, Middlebury, Vermont 05753, and Keith I. Clearwaters, Esq., of the law firm of Chapman & Clearwaters, 1700 K Street, N.W., Washington, D.C. 20006, attorneys for the Petitioner in the above entitled cause, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of July, 1981, we served copies of the foregoing Reply Brief of Petitioner on Yankee Milk, Inc., the Regional Cooperative Marketing Agency, the Solicitor General of the United States, and the Council of Farmer Cooperatives, by mailing three copies thereof, in duly addressed envelopes with first class postage pre-paid, to the attorneys of record for said Respondents, Thomas D. Clifford, Esq., Shipman & Goodwin, 799 Main Street, Hartford, Connecticut 06103; David P. O'Hara, Esq., Bond, Schoeneck & King, One Lincoln Center, Syracuse, New York 13202; Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530; and Donald E. Graham, Esq., National Council of Farmer Cooperatives, 1800 Massachusetts Ave., N.W., Washington, D.C. 20036.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an association of dairy cooperatives that does nothing more than establish prices for its members' milk is immune from price-fixing liability under Section 1 of the Sherman Act.

2. Whether the Capper-Volstead Act and Section 6 of the Clayton Act immunize from liability under Section 2 of the Sherman Act a dairy cooperative's acquisition and maintenance of monopoly power through the voluntary enrollment of all producers in its marketing area.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Fairdale Farms, Inc. ("Fairdale") is a producer and processor of milk. It buys raw milk from other producers in New York, Vermont, and Massachusetts, and sells its processed product in the same three states (Pet. App. 2a, 40a). Respondent Yankee Milk, Inc. ("Yankee") is a 6,000 member dairy cooperative embracing producers in New England and New York (*id.* at 40a). Respondent Regional Cooperative Marketing Agency, Inc. ("RCMA") is an entity created by Yankee and six other northeastern dairy cooperatives to set prices for their members' milk (*id.* at 2a).

Prior to 1974, a portion of Fairdale's raw milk was supplied by members of Yankee (Pet. App. 2a). Subsequently, when RCMA set milk prices above federal order levels,[1] Fairdale objected and ultimately turned from Yankee to alternative sources of supply (*id.* at 3a). Fairdale then sued Yankee and RCMA, alleging that they had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Fairdale conceded that Yankee was a qualified agricultural cooperative under the Capper-Volstead Act, 7 U.S.C. 291, and was immune from antitrust liability for fixing the prices of its members' milk. Fairdale contended, however, that Capper-Volstead immunity does not extend to the operation of RCMA by Yankee and other exempt cooperatives, since RCMA performs no marketing function or service other than fixing prices for the cooperatives. Fairdale also claimed that the Capper-Volstead Act does not immunize dairy cooperatives from liability under Section 2 of the Sherman Act if they intentionally seek and obtain monopoly power. Fairdale asserted that cooperatives could be liable under Section 2 even if they have not engaged in predatory or exclusionary conduct.[2] Yankee and RCMA argued, in contrast, that they were exempt from liability under Section 2 unless their actions in seeking or achieving monopoly power were "predatory" in nature (Pet. App. 12a).

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[1]Under the Agricultural Adjustment Act, 7 U.S.C. 601 *et seq.*, the U.S. Department of Agriculture issues "federal orders" for marketing areas prescribing a minimum pricing system for milk qualified under such orders. See 7 U.S.C. 608c(5) and (18). Producers and their cooperatives, however, can and sometimes do charge "above-order" prices or "premiums" for their milk.

[2]See, *e.g.*, Memorandum of Plaintiff Fairdale in Opposition to Motions for Summary Judgment 76-77; Reply Brief of Appellant in the court of appeals 16.

All parties moved for summary judgment on the Section 1 price-fixing claim. Yankee and RCMA moved for summary judgment on the Section 2 monopolization claim as well.

2. The district court dismissed the Section 1 claim. It found that RCMA, which consists of exempt cooperatives, qualifies for immunity to the same extent as its members, either as an "association" of producers or as a "marketing agen[t] in common" under Section 1 of the Capper-Volstead Act, 7 U.S.C. 291 (Pet. App. 4a). While the court accepted Fairdale's contention that RCMA's sole function was to fix prices for its members (*id.* at 4a-5a), it concluded that the Capper-Volstead Act immunized that function from antitrust challenge even though RCMA engaged in no other marketing activity (*id.* at 12a).

The district court refused to dismiss the Section 2 claim. It held that Fairdale was not required to prove that Yankee and RCMA engaged in predatory, *i.e.*, intentionally anticompetitive, practices to sustain its complaint (Pet. App. 23a). It is not clear, however, whether the district court believed that some anticompetitive conduct, beyond mere voluntary organization of producers into a cooperative, is necessary to prove a violation of Section 2, or whether the court believed that organization of producers into a cooperative to achieve monopoly power is sufficient by itself to constitute illegal monopolization. Compare Pet. App. 20a-21a with *id.* at 14a-15a.

3. The court of appeals affirmed the dismissal of Fairdale's Section 1 claim essentially for the reasons stated by the district court (Pet. App. 41a-44a). With respect to the Section 2 claim, however, the court of appeals concluded (Pet. App. 55a) that it was not clear whether the district court had denied summary judgment solely "on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section." Such a premise,

the court of appeals noted, would be wrong as a matter of law. It thus remanded the monopolization claim so that the district court could state whether its refusal to grant summary judgment was based on the existence of material issues of fact concerning anticompetitive practices other than the organization of producers into cooperatives (*id.* at 44a-56a).

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Although we do not endorse all of the terminology used in the opinion of the court of appeals, the court appears to have adopted the correct legal principles and to have reached the correct result on the record before it. Further review is not warranted.

1. The court of appeals' conclusion that RCMA qualifies for Capper-Volstead immunity, even if it performs no marketing function other than setting prices for its members' milk, is in accord with the few existing cases specifically addressing this question. See *Northern California Supermarkets, Inc.* v. *Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 991-992 (N.D. Cal. 1976), aff'd per curiam, 580 F. 2d 369 (9th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); *In re Central California Lettuce Producers Cooperative*, 90 F.T.C. 18, 54-63 (1977); see also *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F. 2d 203, 214-216 (9th Cir.), cert. denied, 419 U.S. 999 (1974) (rejecting the argument that the term "marketing," as used in Section 1 of the Capper-Volstead Act, requires selling as well as collective bargaining activity as a prerequisite for immunity under Section 1 of the Sherman Act).[3]

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[3]Other cases have held that inter-cooperative price-fixing is immune from antitrust challenge even when no common association or marketing agency has been established for such purpose. *GVF Cannery, Inc.* v.

We believe that these decisions comport with the language and legislative history of the Capper-Volstead Act. Section 1 of the Act, 7 U.S.C. 291, authorizes farmers to form cooperatives, with or without capital stock, to operate for the mutual benefit of the member producers "in collectively processing, preparing for market, handling, and marketing" their products in interstate and foreign commerce. Section 1 also authorizes such associations to have common marketing agencies and to make all "necessary contracts and agreements to effect such purposes." As this Court has held, the express congressional authorization of "collective marketing" includes immunity for price-fixing. *Maryland and Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 466 (1960). While "marketing" incorporates many activities that go beyond the mere fixing of price, there is nothing in the language of the statute that requires cooperatives to perform themselves all of the activities authorized by Section 1, or to perform a complete range of marketing functions, in order to qualify for the antitrust exemption. See *Northern California Supermarkets, Inc.* v. *Central California Lettuce Producers Cooperative, supra*, 413 F. Supp. at 992; *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 214-215.[4]

California Tomato Growers Ass'n, No. C 80-1414 RPA (N.D. Cal. Apr. 15, 1981), slip op. 4-5; *United Egg Producers* v. *Bauer International Corp.*, 312 F. Supp. 319 (S.D.N.Y. 1970); *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D.D.C. 1956); see *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 214 (dictum); *Kinnett Dairies, Inc.* v. *Dairymen, Inc.*, Civ. No. 1701 (M.D. Ga. Mar. 10, 1981), slip op. 41. No case, however, has focused on the meaning of the term "collectively" in Section 1 of the Capper-Volstead Act, as applied to the relationship among the members of a cooperative.

[4]The only limitations prescribed by Section 1 of the Act on "the kind of associations to which the legislation applies" (see H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)), are: (1) the associations must include only "actual farmers" acting "collectively" (2) the associations must operate "for the mutual help of their members as such producers," (3)

Nor is there any indication in the legislative history of the Capper-Volstead Act that Congress intended to force integration of marketing functions as a precondition for collective price setting.[5] Congress did view cooperative marketing as a possible means to "shorten[] the road to market" by eliminating the costly middleman, thereby benefitting the consumer. See, *e.g.*, 62 Cong. Rec. 2060, 2216 (1922). But its primary purpose was to "maintain [the] self-respect and the dignity of * * * the farmer" by giving him "an opportunity to deal in selling his products on an equal footing with those who purchase it." H.R. Rep. No. 939, 66th Cong., 2d Sess. 2 (1920). Efficiencies of integration, while perceived as an added benefit of the legislation, were not its motivating force. Congress' principal goal was a better deal for farmers through collective bargaining and pricing power. 61 Cong. Rec. 1041 (1921); 62 Cong. Rec. 2218, 2225, 2257, 2260 (1922).[6]

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each member must be allowed one and only one vote, (4) dividends on stock must not exceed 8% per year, and (5) the associations must not deal in products of nonmembers in a quantity greater in value than the quantity handled for their own members. *Ibid.*; 7 U.S.C. 291.

[5]It is not clear that requiring more extensive integration than is involved in the collective setting of price would promote price competition. Faced with the choice of either integrating their activities beyond price-setting, dissolving and reforming as one larger cooperative, or forgoing price-fixing entirely, it seems likely that many cooperatives would choose the first or second alternative. Neither of those alternatives would increase competition significantly. Moreover, imposing such burdens and costs on producers might result in a loss of business efficiency. A decision by farmers or cooperatives not to integrate beyond the price setting function may reflect their judgment that greater integration would be less efficient. Policy considerations aside, however, the critical legal factor is that there is no evidence that Congress intended its grant of price fixing immunity to depend on the *form* in which bona fide agricultural producers engage in permissible collective activity including price fixing. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962).

[6]Thus, farmers were given the right to use incorporated or unincorporated organizations roughly comparable to those that businessmen utilized, without disrupting the essential nature of farming. 61 Cong.

This Court repeatedly has held that exemptions from the antitrust laws are not lightly to be inferred,[7] and that even express exemptions are to be construed narrowly.[8] Nonetheless, in every case it is the congressional will that is the touchstone.[9] In the Capper-Volstead Act, Congress expressly allowed agricultural cooperatives to eliminate competition among producers by utilizing common marketing agencies. There is no evidence of a congressional intent to make this express antitrust exemption contingent on either a minimum degree of integration or a particular affiliation format. In these circumstances, the court of appeals correctly concluded that RCMA—all of whose members are qualified cooperatives[10]—is itself entitled to immunity from price-fixing charges.

Rec. 1043 (1921); 62 Cong. Rec. 2218, 2224, 2264 (1922). Through such organizations, farmers could develop the commercial experience and economies of scale that their corporate customers enjoyed. Congress hoped that farmers, through voluntary cooperation, would bargain as equals with large corporate buyers, and, to some extent, would replace them as "middlemen" in the marketing of farm goods. H.R. Rep. No. 24, *supra*, at 3; 61 Cong. Rec. 1033, 1035, 1040 (1921); 62 Cong. Rec. 2159, 2218, 2257, 2264 (1922).

[7]See, *e.g.*, *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 682 (1975); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

[8]*Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *United States* v. *Borden Co.*, 308 U.S. 188, 198-199 (1939); see also *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *Maryland and Virginia Milk Producers Ass'n* v. *United States*, *supra*, 362 U.S. at 465; *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

[9]*National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, No. 80-802 (June 15, 1981), slip op. 10, 14.

[10]There is no allegation that outsiders, *i.e.*, non-producers, are involved in the activities that are challenged in this case. Cf. *United States* v. *Borden Co.*, *supra*, 308 U.S. at 205-206; *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, *supra*; *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 822 (1978).

2. The court of appeals correctly held that a qualified Capper-Volstead cooperative may acquire and maintain monopoly power through the voluntary enrollment of producers without violating Section 2 of the Sherman Act. The court recognized, however, that acquisition or maintenance of monopoly power through any other anticompetitive means, whether predatory or not, subjects a cooperative to antitrust liability under Section 2. See *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F. 2d 1196, 1203-1205 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976) (rejecting claim that predatory acts must be proven to sustain a monopolization charge against an agricultural cooperative). In any event, even if, contrary to our understanding of the opinion of the court of appeals, the court intended to impose a higher anticompetitive conduct requirement in Section 2 cases brought against Capper-Volstead cooperatives, any legal error would not be outcome-determinative in this case. The activities challenged in this case as violative of Section 2 do not go beyond the attainment of monopoly power through voluntary membership. In these circumstances, plenary review by this Court is not necessary to correct ambiguous language in the opinion of the court of appeals.

a. As the court of appeals recognized (Pet. App. 44a-51a), the legislative history of Capper-Volstead[11] reveals

[11]We also refer to Section 6 of the Clayton Act, 15 U.S.C. 17, to the extent relevant. Section 6, enacted in 1914, provides that nothing contained in the antitrust laws shall be construed to prohibit the "existence and operation" of certain labor or agricultural organizations created for the purposes of mutual help, or to prohibit individual members of such orgnizations from "lawfully carrying out [their] legitimate objects." Section 6 also provides that such organizations and their members may not be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." In 1922, the Capper-Volstead Act expanded Section 6 of the Clayton Act to cover cooperatives with capital stock and made explicit their right to market their members' produce. The court of appeals reviewed additional legislation (Pet. App. 48a-50a) to support its construction of the agricultural exemption.

that Congress did not intend to limit the growth of agricultural cooperatives by voluntary producer enrollment.[12] Thus, courts and commentators have acknowledged that a cooperative lawfully may acquire monopoly power—even control of 100% of a market—through voluntary membership enrollment of all producers. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 28-29 (1962); *GVF Cannery, Inc.* v. *California Tomato Growers Ass'n*, No. C 80-1414 RPA (N.D. Cal. Apr. 15, 1981), slip op. 6-7; *Kinnett Dairies, Inc.* v. *Dairymen Inc.*, Civ. No. 1701 (M.D. Ga. Mar. 10, 1981), slip op. 43; *Cape Cod Food Products, Inc.* v. *National Cranberry Ass'n*, 119

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[12]The language and legislative history of Section 2 of the Capper-Volstead Act, 7 U.S.C. 292, support this interpretation. Section 2 authorizes the Secretary of Agriculture to issue a cease and desist order against any cooperative that "monopolizes or restrains trade" to such an extent "that the price of any agricultural product is unduly enhanced by reason thereof * * *." This curb on "unduly" enhanced prices assumes that some monopolization, and even some enhanced prices, will prevail. Congress not only foresaw some aggregation of market power as a result of the legislation, but approved it within stated limits. 62 Cong. Rec. 2053, 2163, 2225 (1922); see 1 P. Areeda & D. Turner, *Antitrust Law* § 228d, at 186-187 (1978). Additional support for this view may be found in the defeat of the "Walsh Amendment." Senator Walsh proposed the following proviso to Section 1 as a substitute for Section 2, which was then contained in the House bill:

> Nothing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly * * *.

S. Rep. No. 236, 67th Cong., 1st Sess. 1 (1921). As Senators Walsh and Pomerene described it during floor debates, the House bill would permit a monopoly, subject to regulation. The Senate bill, with the Walsh Amendment, would forbid monopoly entirely. 62 Cong. Rec. 2157 (1922). The Walsh Amendment was defeated for two reasons: first, because it was viewed as unnecessary, since Congress did not believe farmers could achieve dangerous monopoly power (62 Cong. Rec. 2218, 2261-2262, 2277-2278 (1922)), and second, because it was feared that it would nullify the purpose of Section 1, which was intended to permit farmers to combine (62 Cong. Rec. 2058, 2218, 2219, 2225, 2227, 2261-2262 (1922)).

F. Supp. 900, 907 (D. Mass. 1954); *Shoenberg Farms, Inc.* v. *Denver Milk Producers, Inc.*, 231 F. Supp. 266, 268 (D. Colo. 1964); 7 J. von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 51.07[2], 51.08[3] (1980); L. Sullivan, *Handbook of the Law of Antitrust* 721 (1977); I P. Areeda & D. Turner, *Antitrust Law* § 228d, at 186 (1978); see also Pet. App. 51a-53a & nn.5-6.

The court of appeals correctly noted that, while " 'no illegality would attach' " to the attainment of monopoly " 'through natural growth or the voluntary affiliation with or attraction of new members' " (Pet. App. 53a; citation omitted), a cooperative may not acquire or exercise monopoly power "in a predatory fashion" (*ibid.*).[13] Nor, the court added (*ibid.*), may a cooperative use lawfully acquired monopoly power "to stifle or smother competition." The court referred to insistence on "exclusive dealing" contracts as an example of such forbidden anticompetitive conduct (citing *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F. 2d 263, 274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980)) (Pet. App. 53a). By forbidding both predatory and competition-stifling conduct, the court of appeals appears to have recognized that cooperatives are liable for a broader range of misconduct than is encompassed by the term "predation." Moreover, since the antitrust legality of "exclusive dealing" contracts turns on the competitive effect of such contracts under a rule of reason analysis[14]—and not on

[13]The court did not define the term "predatory," but it listed various types of conduct that it viewed as examples of predatory conduct: picketing and harrassment, boycotts, coerced membership, and discriminatory pricing (Pet. App. 53a).

[14]See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329-331 (1962); *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299, 310 (1949); *Dictograph Products* v. *FTC*, 217 F. 2d 821, 826-827 (2d Cir. 1954); *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651, 678 (S.D.N.Y. 1973), aff'd in part, rev'd in part on other grounds, 522 F. 2d 1242 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976); *Curly's Dairy, Inc.* v. *Dairy Cooperative Ass'n*, 202 F. Supp. 481, 485 (D. Ore. 1962); III P. Areeda & D. Turner, *supra*, § 731a, at 247; L. Sullivan, *supra*, at §§ 163, 165.

anticompetitive intent—the court of appeals' reference to such contracts demonstrates that it was not condoning all anticompetitive conduct except willful or blatant predation.[15]

As we contended in our amicus curiae brief in the court of appeals,[16] it is confusing, as well as legally incorrect, to use the term "predatory" to categorize the type of activity that

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[15]We believe that the court of appeals' isolated reference to "predatory" behavior later in its opinion was nothing more than an attempt to use a shorthand or generic term to cover all types of anticompetitive conduct prohibited by Section 2 of the Sherman Act.

[16]The United States urged the court of appeals to reject the "predatory" behavior standard advocated by respondents in the district court as the basis for a finding of unlawfulness. Our amicus participation was prompted by a government appeal pending in the Sixth Circuit on a similar issue. *United States* v. *Dairymen, Inc.*, Civ. Action No. 7634A (W.D. Ky. Apr. 5, 1978), appeal pending, Nos. 79-3438, 79-3439 (6th Cir.). The district court in *Dairymen* found that the defendants had engaged in various anticompetitive practices, but it viewed as violative of Section 2 only acts deemed to be "predatory." While the court did not define the term "predatory," it apparently referred to conduct so blatantly anticompetitive that an anticompetitive purpose could be inferred. Under that erroneous approach, conduct that has a serious anticompetitive effect or potential effect but which does not, by itself, evidence an intent to restrain competition, is immunized.

The government argued on appeal in *Dairymen* that defendants' entire course of conduct was relevant to the Section 2 issue. That conduct included: (1) coercing processors not to buy milk from competing milk producers; (2) imposing full and committed supply agreements on processors; (3) threatening to withhold business from haulers who dealt with competitors; (4) flooding the market with milk without regard to profit or loss in order to injure competitors; and (5) acquiring 18 processing plants within a five year period, thus foreclosing outlets to competing producers. The district court looked at these acts in isolation, and found that, while several of them potentially could have substantial anticompetitive effects, only (3) and (4), above, were "predatory." As a result, it granted the government limited injunctive relief that did not extend beyond the conduct found to be "predatory."

In both *Dairymen* and the present case, the United States acknowledged that the Capper-Volstead Act permits agricultural cooperatives,

will subject a cooperative to antitrust liability. It is confusing because the term has no generally-accepted meaning, and thus is used differently by different courts.[17] More importantly, if the word "predatory" is used to require proof of willfulness not required when Section 2 of the Sherman Act is applied to other business entities, it represents an incorrect legal standard. Neither the language of Capper-Volstead nor the legislative history indicates a congressional intent to immunize all but the most blatantly anticompetitive conduct of cooperatives. To the contrary, the legislative history is replete with clear indications that, except for conduct integral to their organizational and joint marketing activities, cooperatives are to be treated like

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unlike commercial corporations, to achieve monopoly power by securing voluntary membership of all producers in its markets. But, beyond such voluntary enrollment, agricultural cooperatives are subject to the same constraints that apply to ordinary business corporations under Section 2 of the Sherman Act, whether or not their anticompetitive activities are so egregious as to be characterized as "predatory" or willful.

[17]For example, in *Maryland and Virginia Milk Producers Ass'n, supra*, 362 U.S. at 463, 467-468, this Court variously termed the challenged conduct "predatory" or "competition-stifling," and noted that the conduct was "so far outside the 'legitimate objects' of a cooperative that, if proved, [it] would constitute [a] clear violation[] of § 2 of the Sherman Act by this Association * * *" (*id.* at 468). In *United States* v. *Dairymen, Inc., supra*, the district court appeared to use the term to mean conduct so blatantly anticompetitive that an anticompetitive purpose could be inferred from the conduct itself (see note 16, *supra*). The court of appeals in this case, on the other hand, appears to have adopted a much broader view of the term (Pet. App. 53a-54a). See also *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc., supra*, 497 F. 2d at 216-217 n.11 (reviewing types of cooperative practices termed "predatory" by various courts); *Kinnett Dairies, Inc.* v. *Dairymen, Inc., supra*, slip op. 42 n.31 (noting varying definitions of the term predation ranging from "sinister" (*Telex Corp.* v. *IBM Corp.*, 510 F. 2d 894, 927 (10th Cir. 1975)) or "unnatural" business conduct aimed at injuring competition rather than advancing market position (L. Sullivan, *supra*, at 108, 111-112) to "unreasonable" or "unfair" methods of competition).

ordinary business firms. Abuses of the legitimate monopoly power that a Capper-Volstead cooperative lawfully may acquire were to be disciplined by the antitrust laws, as traditionally construed.[18]

In view of this legislative history, the lower courts repeatedly have held that non-predatory conduct can support a monopolization claim against an agricultural cooperative.[19] Indeed, the only other court of appeals to consider

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[18]61 Cong. Rec. 1033 (1921); 62 Cong. Rec. 2053, 2164 (1922); H.R. Rep. No. 24, *supra*, at 2-3; *Hearings on H.R. 2373 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. 203-205 (1921), cited in *Maryland and Virginia Milk Producers Ass'n* v. *United States*, *supra*, 362 U.S. at 467 n.16.

[19]See *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, *supra*, 497 F. 2d at 216 ("[a] cooperative can lose its exemption if it monopolizes, or attempts to monopolize, *or* engages in 'predatory practices' ") (emphasis added); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F. 2d 449, 451-452, 459 (9th Cir. 1966), cert. denied on Section 2 issue, 387 U.S. 932, rev'd on other grounds, 389 U.S. 384 (1967) ("[e]ven though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the 'whole picture' * * * and draw the 'ultimate conclusion' "); *North Texas Producers Ass'n* v. *Metzger Dairies, Inc.*, 348 F. 2d 189, 194 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966) ("the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation"); *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F. Supp. 476, 485 (E.D. Mo. 1965), aff'd, 368 F. 2d 679 (8th Cir. 1966) (Blackmun, J.) ("*any* use of [] monopoly power to increase and further its power, or to maintain it, when those actions are not inevitable, but are consciously done to increase or preserve the power constitute monopolizing") (emphasis added); *Cape Cod Food Products* v. *National Cranberry Ass'n*, *supra*, 119 F. Supp. at 907 (emphasis added) (a corporation is liable for monopolization "through a restraint of trade which was prohibited, or through a predatory practice, *or* through the bad faith use of otherwise legitimate devices"). But see *United States* v. *Dairymen, Inc.*, *supra* (discussed at notes 16 & 17, *supra*).

Although this Court has not addressed the issue directly, it appears to have recognized that, beyond the aggregation of market power through voluntary enrollment and the joint marketing functions explicitly protected by Section 1 of Capper-Volstead, the Act does not relieve agricultural organizations of the anti-monopolization constraints that are

the identical issue has rejected the contention that cooperatives are immune from Section 2 of the Sherman Act simply because their conduct is not "predatory." *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc., supra*, 526 F. 2d at 1202, 1203-1205.

In these circumstances, it is inappropriate to infer that the court of appeals intended to create a narrow predation standard. See Pet. App. 53a-54a (citing *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra*). Thus, while we believe that the court's use of the term "predatory" was ill-considered, our disagreement with the court's discussion may well be semantic rather than substantive. In any event, the issue need not be resolved on the facts of this particular case in its present interlocutory posture. The conduct challenged here—enlistment of producers in an association in order to acquire market power over price—is lawful no matter where the boundary line is placed. Definition of precisely which activities, beyond voluntary enrollment of members, are to be deemed indicia of unlawful monopolization or an attempt to monopolize would require the Court to go beyond this record and to address hypothetical facts. For this reason, we do not believe this case presents the monopolization issue raised by petitioner in a context appropriate for review.

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placed on ordinary business corporations. In *Maryland and Virginia Milk Producers Ass'n*, v. *United States, supra*, 362 U.S. at 463, 466, this Court held that Section 6 of the Clayton Act and the Capper-Volstead Act do not "immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of § 2 of the Sherman Act * * *"; "the general philosophy of both was simply that individual farmers should be given * * * the same unified competitive advantage—*and responsibility*—available to businessmen acting through corporations as entities" (emphasis added). And in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co., supra*, 370 U.S. at 30, the Court stated that "cooperatives [are] liable for * * * monopolization," without implying any requirement of proof of "predatory" action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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